



2005

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Recommended Citation

Kelly B. Charnley, *Is the Football Culture out of Bounds - Finding Liability for Korey Stringer's Death*, 12 Jeffrey S. Moorad Sports L.J. 53 (2005).

Available at: <https://digitalcommons.law.villanova.edu/mslj/vol12/iss1/3>

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IS THE FOOTBALL CULTURE OUT OF BOUNDS? FINDING LIABILITY FOR KOREY STRINGER'S DEATH

I. INTRODUCTION

In the summer of 2001, Minnesota Vikings football player Korey Stringer died after collapsing from heat exhaustion.¹ The football industry and its fans mourned his death and asked “why?”² Despite the outcry of concern in 2001, players throughout the National Football League (“NFL”) continue to suffer from heat-related illnesses at training camps.³ Although other players have not

1. See John Levesque, *NFL forced to redefine limits*, SEATTLE POST-INTELLIGENCER, July 31, 2003 (describing implications of Stringer's death), available at http://seattlepi.nwsource.com/levesque/133103_leve31.html; see also Gary Mihoces & Larry Weisman, *Stringer's death rocks football world*, USA TODAY.COM, at <http://imnet.csus.edu/imet2/nicher/toohotwebquest/korey.html> (last visited Nov. 29, 2004) (reporting Stringer's death). For a complete discussion of the facts surrounding Stringer's death, see *infra* notes 18-29 and accompanying text.

2. See Mihoces & Weisman, *supra* note 1 (describing grief shared by National Football League, Minnesota Vikings coaches and teammates, players, coaches, and fans throughout football); see also Dan Patrick, *Tragedy raises questions*, ESPN.COM, at <http://msn.espn.go.com/talent/danpatrick/s/2001/0802/1234435.html> (Dec. 6, 2001) (reflecting on questions surrounding Stringer's death). Patrick calls Stringer's death a tragedy that could have been prevented, and notes that more than a day after the tragedy, “the question ‘Why?’ doesn't go away.” *Id.*

3. Mike Freeman, *Unusual Woman Presses Her Unusual Crusade*, N.Y. TIMES, Sept. 26, 2003, at D2 [hereinafter *Unusual Woman*]. After Stringer's death, the NFL increased efforts to educate their member clubs about heat exhaustion. See Levesque, *supra* note 1 (noting NFL banned ephedra, known to exacerbate heat illness, soon after Stringer's death). The NFL also asked all teams to review their training camp policies. See Jim Caple, *An unhealthy sport*, ESPN.COM, at <http://msn.espn.go.com/page2/s/caple/010802.html> (last visited Nov. 29, 2004) (proposing possible NFL actions post-Stringer's death); see also Joshua Freed, *Korey Stringer's widow plans to sue*, at <http://www.idsnews.com/story.php?id=17500> (July 28, 2003) (describing NFL's steps before opening 2002 training camps, including meeting with experts and leading discussions and seminars about heat exhaustion).

By the summer of 2003, the NFL's established response to a player who collapsed from the heat included removing the player's jersey and applying ice and wet sponges to cool the player down. See Eddie Pells, *Heat-related problems crop up again at some NFL training camps*, at http://staugustine.com/stories/073103/spo_1703461.shtml (last visited Nov. 29, 2004) (describing Jacksonville Jaguars' response when 328-pound defensive tackle John Henderson succumbed to heat). Seattle Seahawks trainer, Paul Federici, has said that “[the trainers] look for the physical signs of dehydration – muscle cramping or someone describing fatigue In extreme cases [the players] mental status will change a little bit in terms of confusion, dizziness, and vision impairment.” Levesque, *supra* note 1 (noting each player responds to heat differently, but Federici's general concern heightens when temperature hits 100 and humidity breaks 50 percent). Steve Mariucci, when still head coach of the San Francisco 49ers, listed mass hydration breaks, rest breaks, padless practices, and constant monitoring as ways his team battled the heat. He

met the same fate as Stringer, concern throughout the football world escalates with the increasing frequency of heat-related illnesses.⁴ Heat-related illnesses are prevalent at all levels of athletics. Years before taking the life of a professional athlete, heat exhaustion has taken the lives of high school and collegiate football players.⁵

added that if necessary, intravenous fluids are given to players. Mark Kreidler, *Tragedy won't stop athletes' push to the limit*, ESPN.COM, at http://msn.espn.go.com/nfl/columns/kreidler_mark/1234262.html (Aug. 2, 2001). Steve Mariucci added as an afterthought: "Part of that conditioning is pushing through it. Athletes don't stop because they're a little sweaty, you know? Some of 'em [sic] are so darned tough that they ignore the symptoms – try to push through it." *Id.* Only days after Stringer's death, New England Patriots coach Bill Belichick complained that it was not hot enough for their practices, observing: "You need the heat to get into condition." Kate Randall, *The NFL meat grinder: US pro football player dies in training camp*, at <http://www.wsws.org/articles/2001/aug2001/nfl-a10.shtml> (Aug. 10, 2001).

4. Including Stringer's death, the NFL has seen a total of three player fatalities, but only Stringer's resulted from heat exhaustion. See Thomas George, *Heat Kills a Pro Football Player; N.F.L. Orders a Training Review*, N.Y. TIMES, Aug. 2, 2001, at A1, D4. NFL injuries resulting from heat exposure, however, saw a significant increase in the summer of 2003. See Pells, *supra* note 3 (narrating circumstances of NFL players hospitalized for heat exhaustion during first week of summer 2003 training camp, including two Jacksonville Jaguars players and four Washington Redskins players). See generally Patrick, *supra* note 2 (noting problem of heat exhaustion); Caple, *supra* note 3 (discussing heat exhaustion concerns).

5. Although Stringer is the first professional football player to die from heat exhaustion, eighteen high school and college football players have died from heat stroke since 1995. See Mihoces & Weisman, *supra* note 1 (citing statistics from University of North Carolina's National Center for Catastrophic Sport Injury Research). There have been one hundred and five high school and college football deaths resulting from heat exhaustion since 1955. See Roya R. Hekmat, Comment, *Malpractice During Practice: Should NCAA Coaches Be Liable For Negligence?*, 22 LOY. L.A. ENT. L. REV. 613, 614 (2002) (citing statistics from National Center for Catastrophic Sport Injury Research).

The 2001 football season was particularly tragic. In addition to Stringer's death, three college football players died from non-impact, indirect injuries. See Sarah Lemons, Note, "Voluntary" Practices: The Last Gasp of Big-Time College Football and the NCAA, 5 VAND. J. ENT. L. & PRAC. 12, 12 (Winter 2002) (describing college football injuries during non-mandatory practices). Eraste Autin, a freshman at the University of Florida, died after collapsing of heat exhaustion at a voluntary off-season July practice. See *id.* at 13. Autin's body temperature was 108 degrees upon arrival at the hospital, and the outside temperature that day was 88 degrees, humidity 72%, creating a combined heat index of 102 degrees. See *id.* Devaughn Darling, a freshman at Florida State University, died after collapsing at a voluntary off-season practice in February. See *id.* Darling's fellow players were not alarmed at his collapse because it was commonplace to see players collapse in practices. See *id.* Rashidi Wheeler, a football student-athlete at Northwestern, died of a fatal asthma attack after pushing too hard at a summer "voluntary" practice. See *id.* at 13-14. A video of the practice shows that the drill kept going the entire time Wheeler lay prone and struggled to breathe, and the drill continued through emergency workers trying to revive Wheeler and save his life. See *id.* at 14.

Analysts, coaches, and academics ask if the frequency of heat-related illness in football indicates a larger problem.⁶ Some believe that football's leadership pushes players too hard, inevitably leading to heat exhaustion and other non-contact injuries.⁷ Others believe that while Stringer's death is tragic, players assume certain risks when devoting their lives to the sport of football.⁸ Proponents of this view believe that it requires 110% player effort to be a great football player.⁹ Furthermore, they believe that football players push past their physical limitations in exchange for a chance at million dollar salaries, national fame, and superhero status.¹⁰

Stringer's widow, Kelci Stringer, filed a wrongful death lawsuit against the NFL in the summer of 2003.¹¹ The complaint stated that "National Football League training camps are modern-day sweat shops," and that the training camp conditions "not only are condoned and perpetuated by the National Football League, but also [are] ingrained in its culture, a perverse and deadly culture that the League tolerates, fosters, and even markets."¹² The conditions created by this "deadly culture" allegedly caused Korey Stringer's heat exhaustion and subsequent death.¹³ By bringing

6. For a discussion of the criticisms of football's culture, see *infra* notes 222-40 and accompanying text.

7. For a discussion of the criticisms of football's culture, see *infra* notes 222-40 and accompanying text.

8. See generally Kreidler, *supra* note 3 (discussing risks taken by football players); see also Roy Pickering, *Sports Casualties – Beethavean Scotland & Korey Stringer*, at <http://www.suite101.com/article.cfm/6366/76853> (Aug. 7, 2001) (noting in football it is inevitable someone will be injured). Political shock-talker Bill Maher also weighed in on the debate, insinuating that it is ridiculous for Kelci Stringer to sue the NFL and the Vikings "for allowing the sun to shine on the field that day at practices." Bill Maher, *NFL to Korey Stringer: Drop Dead*, at <http://www.safesearching.com/billmaher/blog/archives/000006.html> (July 29, 2003) (asserting certain risks are ubiquitous for professional athletes and therefore cannot be given equal treatment as other types of liability).

9. See Kreidler, *supra* note 3 ("The elite athletes, they push and they push and they push because, well, hell, they do On just about every level short of the kind of tragedy visited upon the Stringer family, in fact, it is part and parcel of what constitutes 'elite' in sport at all.").

10. For a discussion on why football players push 110%, see *infra* notes 210-21 and accompanying text.

11. See Complaint of Kelci Stringer, *Stringer v. Nat'l Football League, Inc.* (S.D. Ohio July 28, 2003) (No. C2-03-665) [hereinafter *Complaint*]; Freed, *supra* note 3 (reporting complaint was filed).

12. *Complaint*, *supra* note 11, ¶¶ 1-2, at 2-3.

13. See *id.* ¶ 2, at 3 (citing Stringer "being forced to participate fully in practices conducted in extreme heat and humidity while wearing unsafe, heat-retaining, league-mandated equipment, and without proper acclimatization, supervision, or medical care" as example of conditions).

this suit, Ms. Stringer escalated the scrutiny of the football culture and called upon the federal court for a legal resolution.¹⁴

This Comment examines the legal arguments and potential judicial responses to Ms. Stringer's lawsuit against the NFL. Section II explains the facts of the case and summarizes the current status of Ms. Stringer's suit against the Minnesota Vikings.¹⁵ Section III provides a brief background of negligence legal principles and illustrates how various courts use these concepts in sports cases in general, and heat exhaustion cases in particular.¹⁶ Section IV analyzes the current debate surrounding the culture of football and theorizes how these legal principles and cultural assertions potentially intersect to provide traditional and creative legal arguments in the Stringer suit, the first wrongful death suit of its kind brought against the NFL.¹⁷

II. FACTS AND POSTURE OF THE CASE

Korey Stringer entered his seventh professional football season for the Minnesota Vikings at age twenty-seven.¹⁸ Named to the Pro Bowl team the season before, Stringer claimed he was in his best physical shape ever entering the new season.¹⁹ On Monday, July 30, 2001, Stringer left the Vikings' first training camp practice in Mankato, Minnesota, complaining of exhaustion.²⁰ Later that night, Mike Tice, the offensive line coach at the time, allegedly called Stringer a "big baby" for struggling with the heat and teased

14. See *Unusual Woman*, *supra* note 3, at D2 (illustrating Kelci Stringer's determination). In addition to monetary damages, Stringer seeks an injunction to compel the NFL to institute various policies: a mandatory schedule of gradual heat acclimation, mandatory heat measurements, mandatory "black flag" (no practice) days, mandatory hydration, water breaks, and ice pools, among other actions, mandatory practice restrictions after exhibiting heat illness, and other mandatory protocols for heat illness. See generally *Complaint*, *supra* note 11; see also Press Release, Class Action Led by Korey Stringer Family Seeks NFL Reform (July 28, 2003) [hereinafter *Press Release*] (announcing Stringer's suit against NFL), available at <http://www.forrelease.com/D20030728/clm025.P1.07282003182942.24978.html>.

15. For a discussion of the facts and posture of the Stringer case, see *infra* notes 18-41 and accompanying text.

16. For a discussion of the applicable legal concepts in heat exhaustion and "cultural negligence" cases such as Stringer's, see *infra* notes 42-201 and accompanying text.

17. For an analysis of football's culture and potential legal arguments on behalf of Stringer, see *infra* notes 202-99 and accompanying text.

18. See George, *supra* note 4, at A1 (stating Stringer was six feet, four inches tall and 335 pounds).

19. See *id.* at D4 (noting Vikings' head coach Dennis Green believed Stringer was one of top seven or eight players in entire NFL).

20. See *id.* at A1 (illustrating Stringer being carted off football field).

Stringer with a newspaper picture showing Stringer doubled over at practice.²¹

On Tuesday, July 31, 2001, the temperature exceeded 90 degrees, and with the humidity, the heat index reached 110 degrees.²² During practice, Stringer vomited three times, complained of weakness and dizziness, momentarily collapsed during a drill, and breathed heavily when he walked himself to an air-conditioned tent.²³ The trainer in the tent with Stringer observed his condition and offered him water, but did not measure Stringer's vital signs or obtain a medical history of his case from anyone.²⁴ Stringer remained in the tent on an examining table, with the trainer present, for forty-five minutes, until the trainer called for a cart to take Stringer back to practice.²⁵ When Stringer rose to meet the cart, he suddenly laid down on the ground and became unresponsive.²⁶ At this point, the trainer summoned additional help and applied ice towels to Stringer's body.²⁷ When Stringer arrived at Immanuel St. Joseph's-Mayo Health System, his temperature had reached 108.8 degrees.²⁸ He died early the next morning.²⁹

Based on these summarized facts, Stringer's widow, Kelci Stringer, filed a lawsuit against the Minnesota Vikings and other parties.³⁰ In a Memorandum and Order, the Hennepin County District Court of Minnesota granted summary judgment to the Vikings on all counts.³¹

21. See *Allegations levied, Stringer family announces \$100M suit against Vikings*, SPORTS ILLUSTRATED, Jan. 15, 2002 [hereinafter *Allegations levied*], available at http://sportsillustrated.cnn.com/football/news/2002/01/15/stringer_lawsuit_ap/. Mike Tice is now the head football coach of the Minnesota Vikings. See *id.*

22. See George, *supra* note 4, at D4 (reporting National Weather Service declares heat indices at 105 or higher dangerous for heat stroke).

23. See *id.* at A1 (describing Stringer's battle with heat exhaustion before his death).

24. See Memorandum and Order at 17, *Stringer v. Minn. Vikings Football Club, LLC*. (Minn. Dist. Ct. Apr. 25, 2003) (No. 02-00415) [hereinafter *Memorandum & Order*] (noting observations by training staff of Stringer's condition at time of collapse and immediately thereafter, but further noting limited medical attention administered by Vikings' training staff).

25. See *id.* (describing facts of case).

26. See *id.* at 17-18 (describing facts of case).

27. See *id.* at 18 (describing facts of case).

28. See George, *supra* note 4 (describing Stringer's temperature).

29. See *id.* (detailing facts).

30. See generally *Memorandum & Order*, *supra* note 24, at 1 (documenting commencement of Kelci Stringer's lawsuit).

31. See *id.* at 2-4. In December 2003, the court also ordered the Stringer family to repay the Vikings and other defendants \$47,588.03 in legal expenses. See Margaret Zack, *Judge orders Stringers to pay lawsuit costs*, MINNEAPOLIS STAR TRIB., Dec. 12, 2003, at 2B (reporting Hennepin County District Court decision). On

When a professional athlete is injured or dies, state workers' compensation laws provide the exclusive remedy for the injury, no differently than when a factory worker is injured or dies.³² In order to avoid Minnesota's workers' compensation bar against a common law remedy, Ms. Stringer needed to prove that each of the Vikings defendants owed her husband a personal duty and that a reasonable fact finder could conclude that each defendant's conduct was grossly negligent based on the evidence.³³ The court held that each of the Vikings defendants acted toward Stringer within their scope of employment and no one owed him a personal duty.³⁴ In addition, the court found insufficient evidence to support a reasonable finding of gross negligence against any of the Vikings defendants, even when viewing the evidence most favorably to the plaintiffs.³⁵

September 21, 2004, the Court of Appeals of Minnesota affirmed the Hennepin County District Court decision. See *Stringer v. Minn. Vikings Football Club, LLC.*, 686 N.W.2d 545 (Minn. Ct. App. 2004).

32. See Thomas R. Hurst & James N. Knight, *Coaches' Liability for Athletes' Injuries and Deaths*, 13 SETON HALL J. SPORT L. 27, 29-30 (2003) (describing that in Stringer case, Minnesota workers' compensation statute states that employers and co-workers are shielded from liability unless injury resulted from 'gross negligence' or 'intentional harm'; further contemplating difficulty in proving gross negligence or intentional harm in Stringer's death since extreme heat is common in football practices and death from heat exhaustion is not common).

33. See *Memorandum & Order*, *supra* note 24, at 5, 55. For a discussion of workers' compensation exclusivity, see *infra* note 38 and accompanying text.

34. See *Memorandum & Order*, *supra* note 24, at 5-6, 55-80 (addressing each Vikings defendant and finding no personal duty owed). Minnesota case law holds personal duty exists "when a co-employee takes an affirmative, voluntary step to act in a manner that exceeds the scope of his or her usual employment responsibilities." *Id.* at 61. The Court of Appeals of Minnesota disagreed on this issue, finding that assistant trainer Paul Osterman and coordinator of medical services Fred Zamberletti did have a personal duty to Stringer; however, they "nevertheless exercised more than a scant level of care" and accordingly, were not grossly negligent. *Stringer*, 686 N.W.2d at 549-51, 553 (affirming Hennepin County District Court decision).

35. See *Memorandum & Order*, *supra* note 24, at 6, 55-80 (addressing each Vikings defendant and finding no individual conduct that constituted gross negligence). Gross negligence in Minnesota "occurs when a person does not pay the slightest attention to the consequences, or uses no care at all." *Id.* at 61.

The court insulated the Vikings' affirmative defenses of comparative negligence, assumption of risk, and pre-existing condition in the event that its decision is reversed in the future. See *id.* at 7 (denying plaintiff's motion to dismiss defendants' affirmative defenses). The court found a reasonable jury could find sufficient evidence to support these defenses, which rely in part on the allegations that Stringer had taken ephedra before practice and did not arrive at training camp in appropriate physical condition. See *id.* at 7, 94-95 (noting Kelci Stringer testified that Korey Stringer regularly used supplements containing ephedra prior to games, despite knowing dangers of ephedra).

The Minnesota workers' compensation statute severely limited the potential remedy Ms. Stringer could recover from the Vikings.³⁶ In order to overcome the exclusivity doctrine, which bars an employee from seeking common law action against an employer, the law required Ms. Stringer to meet a heavy burden; she had to prove both personal duty and gross negligence.³⁷ The gross negligence in Minnesota is defined as slight care with no concern (almost no care), therefore, any evidence that the defendants attempted to do their job is sufficient to uphold the exclusivity doctrine.³⁸

Legal experts predicted that no matter the outcome of the Vikings suit, an important legal precedent could be established to determine how teams protect "peewee" to professional football players in the future.³⁹ The failure of the Vikings lawsuit did not

36. Legal remedies for injured professional football players are governed by four factors: 1) the state workers' compensation law; 2) the collective bargaining agreement between the NFL and the NFL Players Association; 3) the contract between the injured player and his team; and 4) common law tort theories. See Halcomb Lewis, *An Analysis of Brown v. National Football League*, 9 VILL. SPORTS & ENT. L.J. 263, 264 n.3 (2002).

37. State workers' compensation statutes provide the largest hurdle to a professional football player wanting to sue his team. Workers' compensation statutes include an intentional tort exception. See R. Brian Crow & Scott R. Rosner, *Institutional and Organizational Liability for Hazing in Intercollegiate and Professional Team Sports*, 76 ST. JOHN'S L. REV. 87, 106 (2002) (explaining legal barriers that accompany workers' compensation statutes). For the employee to escape the confined remedies under worker compensation laws, the employer must have acted intentionally or deliberately with the intent to harm the employee. See *id.* at 106-07 (defining intentional tort).

38. In Minnesota, the workers' compensation statute provides for more than 66% of the worker's pay, capped at a certain amount, plus \$15,000 towards burial costs. See Hurst & Knight, *supra* note 32, at 30. While most states treat professional athletes the same as all other workers under workers' compensation statutes, Massachusetts and Florida specifically exclude covering professional athletes from workers' compensation coverage. See Lewis, *supra* note 36, at 265 n.4. Workers' compensation statutes commonly include an exclusivity doctrine barring an employee from seeking a remedy under common law. See *id.* at 266 n.7 (articulating barriers to suing NFL teams). Although the exclusivity doctrine bars common law action against an employer, a plaintiff can pursue a common law action from responsible third parties. See *id.* at 271-72 (noting Stringer will need to sue NFL via third party suit). In a recent antitrust dispute, the NFL itself argued that the league and its member clubs (the teams) were a single entity. The court, however, found that NFL member clubs "are 'separate economic entities engaged in a joint venture.'" *Id.* at 272-73.

39. See Andy Hemmer, *Maximum Blitz: Attorney Stan Chesley throws weight behind \$100 million lawsuit*, CINCINNATI BUS. COURIER, Mar. 29, 2002, available at <http://cincinnati.bizjournals.com/cincinnati/stories/2002/04/01/story2.html>. "The result may be that teams enact a mandatory policy to force some of these macho guys to take a break from the heat Guys don't want to look like the weenie. But if they're all forced to do it, they're all gonna [sic] do it." See *id.* (quoting Rob Becker, New York attorney and analyst for Fox Sports).

deter Kelci Stringer.⁴⁰ She next filed a negligence lawsuit against the National Football League.⁴¹

III. BACKGROUND

To win a negligence lawsuit, the plaintiff must prove four elements.⁴² First, the plaintiff must show that the defendant owed the plaintiff a duty to maintain a certain level of care.⁴³ This duty of care usually requires that the defendant act in the same manner that a reasonable person would act in similar circumstances.⁴⁴ Second, the plaintiff must show that the defendant did not provide the requisite level of care owed to the plaintiff.⁴⁵ The plaintiff can establish that the defendant breached his or her duty of care by providing evidence that the defendant's conduct failed to conform to the reasonable person standard.⁴⁶ Third, the breach by the defendant must actually and proximately cause the plaintiff's injury.⁴⁷ Fi-

40. See *Unusual Woman*, *supra* note 3, at D1 (portraying Kelci Stringer as ambitious and focused on goal to change NFL training camps). For a description of the complaint allegations, see *supra* notes 12-14 and accompanying text.

41. See *Unusual Woman*, *supra* note 3, at D2 (describing Kelci Stringer's unwavering devotion to belief that culture surrounding football must change). At the time of this article, Kelci Stringer was in the process of gathering other parties to join her class action suit against the NFL. See generally Register, *Big Class Action*, at http://www.bigclassaction.com/class_action/koreystinger.html (last visited Nov. 29, 2004) (encouraging readers to join Stringer lawsuit if they feel they qualify for similar remedy).

42. See Hekmat, *supra* note 5, at 616 (defining negligence); see also Donald T. Meier, Note, *Primary Assumption of Risk and Duty in Football Indirect Injury Cases: A Legal Workout From the Tragedies on the Training Ground for American Values*, 2 VA. SPORTS & ENT. L.J. 80, 101 (2002) (describing legal principles relevant to Rashidi Wheeler's and Stringer's wrongful death suits).

43. See *Griggs v. BIC Corp.*, 981 F.2d 1429, 1434 (3d Cir. 1992) (defining elements of negligence in Pennsylvania); *McElhaney v. Monroe*, C.A. No. 13454, 1989 Ohio App. LEXIS 366, at *3 (Ohio Ct. App. Feb. 1, 1989), *mot. overruled*, 539 N.E.2d 166 (1989) (listing components of negligence in Ohio); Hekmat, *supra* note 5, at 616 (listing components of negligence suit).

44. See Hekmat, *supra* note 5, at 616 (describing reasonable person standard as minimum level of care that "requires a person to avoid creating unreasonable risks of injury to others").

45. In other words, the defendant *breached* the duty of care. See Hekmat, *supra* note 5, at 616 (listing components of negligence suit); see also *Griggs*, 981 F.2d at 1434 (defining elements of negligence in Pennsylvania); *McElhaney*, 1989 Ohio App. LEXIS 366, at *3-4 (listing components of negligence in Ohio); Hekmat, *supra* note 5, at 617 (quoting GEORGE W. SCHUBERT, ET AL., SPORTS LAW § 7, at 182 (1986)) ("If a person realizes or should realize that their conduct exposes another to an unreasonable risk of injury from third parties, animals or forces of nature, then he or she will be negligent for acting in that manner.").

46. See Hekmat, *supra* note 5, at 617 (describing reasonable person standard).

47. See *Griggs*, 981 F.2d at 1434 (defining elements of negligence in Pennsylvania); see also *McElhaney*, 1989 Ohio App. LEXIS 366, at *4 (listing components of negligence in Ohio); Hekmat, *supra* note 5, at 616-17 (noting defendant may

nally, the plaintiff must die or sustain injury.⁴⁸ The injury must significantly impact the victim; a nominal injury is not sufficient.⁴⁹

This Section explores the major legal concepts frequently discussed in negligence cases.⁵⁰ Part A examines what factors determine if a defendant owes a duty of care to the plaintiff.⁵¹ Part B briefly comments on public policy arguments that may also influence a court's finding of duty.⁵² Part C explains the assumption of risk affirmative defense that many defendants assert in negligence cases.⁵³ Finally, Part D discusses the theory of inherent compulsion, an approach New York courts use in negligence analysis.⁵⁴

A. Duty of Care in Negligence Cases

Duty of care is the central concept in negligence cases.⁵⁵ Two essential factors in determining both whether a duty of care exists and the level of care required are the existence of a special relation-

still be liable even if his or her breach is not sole cause of injury, but made substantial contribution to injury). When establishing negligence, injuries that were not foreseeable, but instead, pre-existed and were aggravated by the alleged breach of duty, may be included in the claim. See Hekmat, *supra* note 5, at 617.

48. See *Griggs*, 981 F.2d at 1434 (defining elements of negligence in Pennsylvania); see also *McElhaney*, 1989 Ohio App. LEXIS 366, at *4 (listing components of negligence in Ohio); Meier, *supra* note 42, at 101 (explaining most negligence cases hinge not upon this component, but instead upon showing duty of care and breach of that duty).

49. See Hekmat, *supra* note 5, at 618 (describing damages as most conspicuous element of negligence).

50. Because the Stringer case will largely turn on whether or not the NFL owed Stringer a duty of care, this Comment does not explore the second, third, and fourth elements in the negligence case. If a duty is found, then the breach of that duty is a factual question for the fact finder, and the causation element will turn on whether or not the NFL breach of duty contributed to Stringer's heat exhaustion. There is little doubt that the injury requirement in this case has been satisfied. For a listing of negligence elements, see *supra* notes 42-49 and accompanying text.

51. For a discussion of duty of care, see *infra* notes 55-123 and accompanying text.

52. For a discussion of public policy considerations in duty of care decisions, see *infra* notes 124-30 and accompanying text.

53. For a discussion of the assumption of risk doctrine, see *infra* notes 131-61 and accompanying text.

54. For a discussion of inherent compulsion, see *infra* notes 162-201 and accompanying text.

55. See *Griggs v. BIC Corp.*, 981 F.2d 1429, 1435 (3d Cir. 1992) (differentiating elements of negligence and strict liability cases); see also *Brown v. Day*, 588 N.E.2d 973, 974 (Ohio Ct. App. 1990) (dismissing negligence claim against university-defendant when university had no knowledge of student-defendant's violent tendencies).

ship between the defendant and the plaintiff and the foreseeability of risk in the activity.⁵⁶

Defendants in authoritative roles, such as supervisors, administrators, and coaches, commonly have a special relationship with athletes because they are often in the best position to prevent injury.⁵⁷ Accordingly, defendants in authoritative roles are often held more accountable because they can control the conduct of the activity.⁵⁸ Moreover, authorities involved in inherently dangerous activities, such as football, are frequently held to heightened accountability.⁵⁹ The heightened duty of care in football requires coaches to give both adequate and non-negligent warnings, instruction, and supervision.⁶⁰

When analyzing the foreseeability of risk, courts traditionally apply a risk-utility analysis that weighs “the risk, in light of the social value of the interest threatened, and the probability and extent of the harm”⁶¹ In football, coaches must warn players and protect them from foreseeable injury, even when the injury occurs in an unforeseeable manner.⁶² Coaches must instruct players in a

56. See *McElhaney v. Monroe*, C.A. No. 13454, 1989 Ohio App. LEXIS 366, at *4 (Ohio Ct. App. Feb. 1, 1989) (“[D]uty centers upon whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct.”); *Hekmat*, *supra* note 5, at 616-17 (noting while “minimum duty of care requires a person to avoid creating unreasonable risks of injury to others”, heightened duty of care “imposes a duty of care to protect against those risks that the [defendant] did not create”).

57. See *Hekmat*, *supra* note 5, at 617 (describing heightened duty of care on authoritative figures).

58. See *id.* (noting when courts will impose heightened duty of care).

59. See *id.* at 617, 619 (emphasizing heightened duty of care for inherently dangerous activities including football); see also *Turcotte v. Fell*, 502 N.E.2d 964, 967 (N.Y. 1986) (stating plaintiff’s reasonable expectations of duty owed to him were “particularly true in professional sporting contests” because of increased danger).

60. See *Meier*, *supra* note 42, at 102 (describing broad duty of care).

61. *Griggs v. BIC Corp.*, 981 F.2d 1429, 1436 (3d Cir. 1992) (quoting *W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 31, at 173 (5th ed. 1984)) (footnotes omitted).

62. See *id.* at 1435 (“[A] conclusion that a duty exists under negligence law expresses the existence of foreseeability of harm and serves as a predicate for fault”); see also *Hekmat*, *supra* note 5, at 619 (applying negligence law to college football). At least one jurisdiction has held that a defendant breached a duty of care when defendant negligently caused serious mental distress where the mental distress was reasonably foreseeable. See *Leong v. Takasaki*, 520 P.2d 758, 765 (Haw. 1974) (concluding legal protection from negligent infliction of serious mental distress exists in tort system). If a defendant can be expected to reasonably foresee serious mental distress, it follows that a defendant could also be expected to reasonably foresee heat exhaustion. Unlike mental distress, heat exhaustion exhibits physical manifestations. For a discussion of the physical manifestations of heat exhaustion, see *infra* notes 81-82 and accompanying text.

manner that does not create additional risks.⁶³ Coaches must supervise their players proportionately to the amount of risk inherent in the activity.⁶⁴ A coach will more likely fulfill his or her duty to players by providing safe equipment, timely medical care, and concern and attention to injuries.⁶⁵ The precise level of care a coach needs to give decreases as the age, skill, and experience of the players increase.⁶⁶

1. *General Application of Duty of Care Principles*

The Third Circuit recently framed the duty of care issue in indirect injury cases in *Kleinknecht v. Gettysburg College*.⁶⁷ Drew Kleinknecht, who was twenty years old, died after collapsing at a lacrosse practice at Gettysburg College.⁶⁸ Medical evidence showed that the collapse resulted from a heart arrhythmia.⁶⁹ The nearest telephone to call for help sat 200 to 250 yards away, and at the time of the collapse, no one at the practice knew CPR.⁷⁰

The United States District Court for the Middle District of Pennsylvania granted summary judgment to Gettysburg College, finding that the college owed no special duty of care to Kleinknecht.⁷¹ On appeal, the Third Circuit remanded, finding a special relationship existed between the college and Kleinknecht "in his capacity as a school athlete."⁷² The Third Circuit pointed

63. See *Bereswill v. Nat'l Basketball Ass'n, Inc.*, 719 N.Y.S.2d 231, 232 (N.Y. App. Div. 2001) (holding because defendant did not enhance any existing risks present at basketball game, defendant did not owe duty to plaintiff); see also *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992) ("[I]t is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.").

64. See Hekmat, *supra* note 5, at 619 (quoting GEORGE W. SCHUBERT, ET AL., SPORTS LAW § 7, at 176 (1986)) (commenting that coaches must supervise their players proportionately to danger inherent in activity, because coaches have duty to warn against dangers that "should have been discovered in the exercise of reasonable care").

65. See *id.* (providing other factors when assessing coaches' liability).

66. See *id.* (explaining that coaches' liability will decrease as players' ages increase); see also *Crohn v. Congregation B'Nai Zion*, 317 N.E.2d 637, 641 (Ill. App. Ct. 1974) (stating it is common knowledge that higher duty of care exists with respect to defendants responsible for children because children are not capable of exercising same level of care for their safety as adults are).

67. 989 F.2d 1360 (3d Cir. 1993).

68. See *Kleinknecht*, 989 F.2d at 1363 (describing facts of case).

69. See *id.* at 1365 (identifying injury).

70. See *id.* at 1363 (describing facts of case).

71. See *id.* at 1362 (recounting lower court's holding). The court is to decide whether or not, as a matter of law, the defendant owed a duty of care to the plaintiff. See *id.* at 1366.

72. See *id.* at 1375 (stating holding and remanding case to District Court to determine whether College breached its duty of care).

out that at the time of the injury, Kleinknecht was not engaged in his private affairs as a student, but was instead participating in a collegiate athletic event under the supervision of college employees.⁷³ The court conceded that the college athlete-coach relationship was not as close as a high school athlete-coach relationship, which demands a more compelling duty of care.⁷⁴ Because the college actively recruited Kleinknecht to play lacrosse, the court held that the duty of care required was similar to a high school athlete-coach relationship.⁷⁵ The court followed *Wissel v. Ohio High School Athletic Ass'n*,⁷⁶ labeled any argument that says an organization that decides the rules and equipment used in an event owes no reasonable care to athletes as "incongruous."⁷⁷

In addition, the Third Circuit explained that the plaintiff must demonstrate only "the likelihood of the occurrence of a general type of risk rather than the likelihood of the occurrence of the precise chain of events leading to the injury."⁷⁸ While the court conceded it impossible to guard against every possible risk, it held that the defendant had a duty to reasonably guard against generally foreseeable hazards.⁷⁹ The court found the college's failure to protect against possible harms from injury during practices unreasonable, stating that although it is atypical for a college athlete to collapse, the occurrence was "within a reasonably foreseeable class of unfortunate events" that might arise during an athletic practice.⁸⁰

73. See *Kleinknecht*, 989 F.2d at 1367 (noting other states have found similar special duty of care between colleges and recruited athletes).

74. See *id.* at 1367 n.5 (distinguishing public, pre-college school coach as having closer relationship with student athlete than college coach with student athlete).

75. See *id.* at 1375 (discussing court's holding).

76. 605 N.E.2d 458 (Ohio Ct. App. 1992).

77. *Kleinknecht*, 989 F.2d at 1369 (citing *Wissel v. Ohio High Sch. Athletic Ass'n*, 605 N.E.2d 458 (Ohio Ct. App. 1992)). "The fact that these organizations purport to act gratuitously and for noble purposes does not, ipso facto, absolve them of a legal duty of care toward the athletes." *Id.*

78. *Id.* (exploring foreseeability).

79. See *id.* at 1370 (conceding difficulty in predicting all possible dangers).

80. *Id.* at 1372. The Third Circuit quoted *Leahy v. Sch. Bd. of Hernando County*, 450 So. 2d 883, 885 (Fla. Dist. Ct. App. 1984), which held that reasonable care should include "giving adequate instruction in the activity, supplying proper equipment, making a reasonable selection or matching of participants, providing non-negligent supervision of the particular contest, and taking proper post-injury procedures to protect against aggravation of the injury." *Kleinknecht*, 989 F.2d at 1371 (listing actions coaches should take in order to maintain reasonable care). Whether or not the college breached this duty of care or acted reasonably is for a jury to determine. See *id.* at 1373.

2. *Application in Heat Exhaustion Cases*

Heat exhaustion (also known as heat stroke) is easily recognizable from its symptoms: muscle cramps, headaches, dizziness, nausea, vomiting, flushed dry skin, blurred vision, and a loss of consciousness.⁸¹ Additionally, overweight people are more likely to suffer from heat exhaustion because their bodies absorb heat more readily.⁸² A heat exhaustion victim's fate depends upon how quickly cooling methods are applied.⁸³ The most effective cooling method is water immersion, but if unavailable or not advisable due to the age or health of the victim, a fan, a cool wet cloth, or an ice pack can also be effective.⁸⁴ If the body's core temperature is not reduced quickly, the victim can suffer multiple organ complications and ultimately death.⁸⁵

The key to battling heat exhaustion is prevention.⁸⁶ Prevention is best achieved through fluid replacement, acclimatization, proper dress, and cool work environments.⁸⁷ To properly replace fluids, athletes should drink sixteen ounces of water before exercising and eight ounces every twenty minutes during exercise.⁸⁸ Healthy people become acclimatized after seven to ten days of be-

81. See Niomi Bauer, *et al.*, *Heat Stroke: As Related to the Death of Korey Stringer*, UNIV. OF MARY HEALTH PROFS. J., Sept. 2002, at 1 (discussing symptoms of heat stroke), available at <http://www.umary.edu/PDF/UMHPJVol2Issue1.pdf>.

82. See *Gehling v. St. George's Univ. Sch. of Med., Ltd.*, 705 F. Supp. 761, 764 (E.D.N.Y. 1989) (listing proposition as finding of fact); see also Selena Roberts, *N.F.L.'s Pernicious Culture of Obesity*, N.Y. TIMES, Aug. 24, 2003, § 8, at 5 [hereinafter *Culture of Obesity*] (describing dangers of NFL's culture of obesity).

83. See Bauer, *supra* note 81, at 4 (emphasizing patient should be taken to hospital immediately).

84. See *id.* (explaining cooling methods).

85. See *id.* (noting risks if body temperature not cooled).

86. See *id.* (discussing prevention of heat exhaustion). In order to prevent heat exhaustion, NFL coaches and trainers follow guidelines established by the National Athletic Trainers' Association ("NATA"). See Randall, *supra* note 3 (noting following Stringer's death, NATA recommended to NFL that teams not practice in hot temperatures, but NFL has not adopted recommendation).

87. See Bauer, *supra* note 81, at 4 (listing methods to prevent heat exhaustion). Many NFL players at training camp will take a break for a wet towel on the back of his neck in order to deal with the heat. See Paul Attner, *Despite precautions, camp conditions put players at risk*, SPORTINGNEWS.COM, at http://web.archive.org/web/20010805014709/http://www.sportingnews.com/voices/paul_attner/20010801.html (Aug. 1, 2001) (describing common sights at NFL training camps).

88. See Bauer, *supra* note 81, at 4 (stressing importance of fluids). One sports analyst said that practicing without water breaks is a tradition of the past. See Attner, *supra* note 87 (commenting that in past, it was considered "less than manly" to take water break during practice). In more serious situations, NFL players get intravenous (I.V.) transfusions to replenish fluids. See *id.* (commenting "that kind of Neanderthal thinking has given way to a much more enlightened approach").

ing in a particular climate.⁸⁹ Wearing light colored, loose fitting, lightweight clothing is recommended in warmer climates.⁹⁰ Working in shaded areas or at times of day when the temperature is cooler also helps prevent heat exhaustion.⁹¹

Before *Erie Railroad Co. v. Tompkins*,⁹² which decided that federal courts should apply state common law in cases not arising out of the United States Constitution or Acts of Congress, the Supreme Court addressed how heat exhaustion should be viewed within the framework of federal tort law.⁹³ In *Landress v. Phoenix Mutual Life Insurance Co.*,⁹⁴ the majority distinguished between death caused by accidental *means* and death as an accidental *result*.⁹⁵ The Court held that sunstroke is a *means* by which injury occurs and because the plaintiff voluntarily exposed himself to the sun's rays, the injury was not caused by accidental means.⁹⁶ Justice Cardozo dissented, arguing that the sun's rays should be viewed as the first step setting causation in motion, resulting in accidental injury.⁹⁷ He warned against trying to distinguish sunstroke from a simple accidental death.⁹⁸

More recently in *Mogabgab v. Orleans Parish School Board*,⁹⁹ the parents of a high school football player brought a wrongful death suit after their son died of heat exhaustion during a football prac-

89. See Bauer, *supra* note 81, at 4 (defining acclimation).

90. See *id.* (recommending specific clothing to prevent heat exhaustion).

91. See *id.* (stressing to avoid hottest times of day to prevent heat exhaustion).

92. 304 U.S. 64 (1938).

93. See *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491, 494 (1934) (describing plaintiff golfer who suffered and died from sunstroke). But see *Lang v. N.Y. Life Ins. Co.*, 581 F. Supp. 1, 1-2 (D.N.J. 1982), *rev'd*, 721 F.2d 118 (3d Cir. 1983) (noting because *Landress* was decided before *Erie*, case now has little value).

94. 291 U.S. 491 (1934).

95. See *id.* at 497 (describing external means when stipulated cause of injury was from external source, and external result when conditions external to plaintiff's body contributed to injury). Here, decedent's wife sued her husband's life insurance company for payment on his accidental death policy, which was to pay out if he died by "external, violent and accidental means." *Id.* at 495. She argued that death caused by sun exposure was "accidental" in the popular sense of the term, and that she was therefore entitled to the money when her husband died of sunstroke. See *id.* at 495-96.

96. See *id.* (holding although resulting death was accidental, sunstroke resulted from voluntary exposure to sun). But see *Wickman v. Northwestern Nat'l Life Ins. Co.*, 908 F.2d 1077, 1085-86 (1st Cir. 1990), *cert. denied*, 498 U.S. 1013 (1990) (rejecting *Landress* distinction between accidental means and accidental results).

97. See *Landress*, 291 U.S. at 498-99 (Cardozo, J., dissenting) (arguing sunstroke is, in "common language," accidental death).

98. See *id.* at 499 (cautioning that this distinction could "plunge this branch of the law into a Serbonian Bog").

99. 239 So. 2d 456 (La. Ct. App. 1970).

tice. The parents claimed that the coaches did not provide prompt medical care.¹⁰⁰ The Louisiana appeals court overturned summary judgment granted in favor of the defendant, finding that the coaches failed to get medical help in a reasonable time after Mogabgab first became faint during practice.¹⁰¹ Mogabgab collapsed from heat exhaustion at 5:20 p.m., but did not go to the hospital until 7:15 p.m. after his mother, not the coaches, called a doctor after arriving on the scene.¹⁰² In a significant decision, the court recognized the progressive nature of heat exhaustion injuries.¹⁰³ It held that the failure to obtain prompt medical attention after the onset of heat exhaustion caused the injury because at some point during the progressing injury the damage to the body became irreversible.¹⁰⁴ In the court's view, Mogabgab would likely have lived but for the coaches' failure to provide prompt medical care.¹⁰⁵

In *Gehling v. St. George's University School of Medicine, Ltd.*,¹⁰⁶ the plaintiff suffered from heat stroke and died after participating in a "fun run" organized by his medical school.¹⁰⁷ On the day of the run, the temperature exceeded eighty degrees, with high humidity.¹⁰⁸ The court held that the defendant owed no duty to the plaintiff because the school did not control, monitor, or supervise the race.¹⁰⁹ The court further held that even if there was a duty, the school did not cause the plaintiff's death.¹¹⁰ Rather, the plaintiff's

100. See *Mogabgab*, 239 So. 2d at 457 (describing claim).

101. See *id.* at 460-61 (giving holding of case).

102. See *id.* at 458 (listing defendants' admissions).

103. See *id.* at 460 (synthesizing medical evidence of case); see also Hurst & Knight, *supra* note 32, at 37 (identifying critical part of holding). But see *Gehling v. St. George's Univ. Sch. of Med., Ltd.*, 705 F. Supp. 761, 765 (E.D.N.Y. 1989) (finding that heat stroke is frequently fatal even when immediate care is given, thus, no credible evidence that plaintiff would have lived had he had immediate care); but cf. *Hanson v. Kynast*, 494 N.E.2d 1091, 1096-97 (Ohio 1986) (upholding summary judgment for defendant after no evidence presented that delay in treatment negatively effected plaintiff's head injury).

104. See *Mogabgab*, 239 So. 2d at 460 ("If [appropriate medical assistance] is long delayed, there is little hope."). For a discussion of the progressive nature of heat exhaustion injury, see *supra* notes 83-85 and accompanying text.

105. See *Mogabgab*, 239 So. 2d at 460-61 (summarizing medical record); see also Hurst & Knight, *supra* note 32, at 37 (detailing court awarding damages to Mogabgab).

106. 705 F. Supp. 761 (E.D.N.Y. 1989).

107. See *Gehling*, 705 F. Supp. at 763 (describing facts of case).

108. See *id.* (summarizing facts of case).

109. See *id.* at 766 (giving holding of case).

110. See *id.* at 766-67 (noting holding of case).

overweight condition caused his death, not any condition caused by the defendant.¹¹¹

3. Common Bars to Heat Exhaustion Cases

Many claims for heat exhaustion injuries that occur during public school athletic events and practices turn on other grounds, especially state immunity statutes.¹¹² In one such case, *Prince v. Louisville Municipal School District*,¹¹³ the plaintiff alleged that he suffered heat exhaustion during football practice because the coaches failed to monitor his health, provide necessary liquids, and provide medical care.¹¹⁴ For Prince to overcome state immunity, which would bar any action against parties acting in a state capacity, he had to show that the coaches acted beyond the scope of their discretionary functions.¹¹⁵ The court upheld the lower court's dismissal based upon state immunity, finding that there was no evidence the coaches "did anything beyond exercising ordinary discretion."¹¹⁶ The dissent contended that the court wrongly extended state immunity to include medical care as a discretionary function,

111. See *id.* (stating conclusion about cause of death). The case insinuates that Gehling's failure to control his overweight condition contributed to him not safely finishing the "fun run." See *id.* at 766. Many NFL players, including Corey Stringer, are required by their NFL contracts to maintain a weight that is considered obese and unhealthy. For a discussion of this trend within the NFL, see *infra* notes 238-40 and accompanying text.

112. See *Prince v. Louisville Mun. Sch. Dist.*, 741 So. 2d 207, 210 (Miss. 1999) (deciding scope of Miss. CODE ANN. § 11-46-1, which provided limited waiver of sovereign immunity in tort claims); see also *Vargo v. Svithchan*, 301 N.W.2d 1, 3 (Mich. Ct. App. 1980) (discussing scope of MICH. COMP. LAW § 691.1407 (MICH. STAT. ANN. § 3.996(107)) that provides state employee protections). Another bar to heat exhaustion cases is evidential insufficiency. See *Draughton v. Harnett County Bd. of Educ.*, 580 S.E.2d 732, 737 (N.C. Ct. App. 2003), *aff'd*, 582 S.E.2d 343 (N.C. 2004) (holding that plaintiff's death from complications of heat stroke after collapse at football practice lacked sufficient evidentiary support to meet prima facie case).

113. 741 So. 2d 207 (Miss. 1999).

114. See *Prince*, 741 So. 2d at 209 (stating facts of case).

115. See *id.* at 211 (discussing Alabama past cases based on state immunity). Alabama considers maintaining good order and discipline of the team, deciding if a player is injured, and deciding whether or not a player needs medical attention is all within a coach's discretionary role. See *id.* at 212 (describing Alabama Supreme Court's definition of coach's job); see also *Sorey v. Kellett*, 673 F. Supp 817 (S.D. Miss. 1987), *rev'd*, 849 F.2d 960 (5th Cir. 1988) (dismissing claim against university where plaintiff-student fell ill at football practice and subsequently died); *Barrett v. Unified Sch. Dist. No. 259*, 32 P.3d 1156, 1162 (Kan. 2001) (holding where plaintiff collapsed at first football practice of season and subsequently died, claim can only advance if gross or wanton negligence present because ordinary negligence claim barred by state immunity clause).

116. See *Prince*, 741 So. 2d at 212 (noting finding in lower court).

and therefore, the coaches in the case did have a duty of care to the plaintiff.¹¹⁷

The dissent's contention in *Prince* provided the foundation of the majority's opinion in *Vargo v. Svithchan*.¹¹⁸ In *Vargo*, a fifteen-year-old student was rendered paraplegic after a 250 to 300 pound weight fell on him during a weight lifting session for a school football team tryout.¹¹⁹ In the complaint, the plaintiff alleged that the principal and athletic director were negligent by allowing the football coach "to abuse students and to threaten and pressure them into attempting athletic feats beyond their capabilities"¹²⁰ The court said that the school officials' protection under the immunity statute turned on whether their actions were discretionary.¹²¹ Relying on a prior decision, the court held the immunity statute did not protect the principal because, among other reasons, the principal was ultimately responsible for the summer weight lifting program and should have minimized the potential injury in such a program, including the "overexertion and resultant injuries [which] are foreseeable and frequent in the absence of proper supervision."¹²² Largely based on the same rationale, the court also denied state immunity for the athletic director because he was "in a position and authority to oversee the practices," "promulgate[] reasonable safety precautions," and "minimize[] injury to the students."¹²³

Besides the traditional duty elements and absolute bars to a finding of duty, public policy considerations frequently impact whether a court finds there is a duty of care owed to a plaintiff.¹²⁴

B. Public Policy Influences in Assessing Duty

Courts decide whether defendants owe a duty based on the total of all policy influences.¹²⁵ The Third Circuit in *Kleinknecht* advanced a public policy position, noting that the Supreme Court of

117. See *id.* at 214-15 (Banks, J., dissenting) (disagreeing with majority's decision to extend immunity to coaches).

118. 301 N.W.2d 1 (Mich. Ct. App. 1980).

119. See *Vargo*, 301 N.W.2d at 3 (describing facts).

120. *Id.* (summarizing allegations).

121. See *id.* at 4 (defining discretionary acts as "those of a legislative, executive or judicial nature").

122. *Id.* at 5 (denying principal-defendant immunity and remanding case to decide principal's negligence).

123. *Id.* at 5, 8 (remanding case to decide if athletic director in fact negligent).

124. For a discussion of public policy influences on findings of duty, see *infra* notes 125-30 and accompanying text.

125. See *Leong v. Takasaki*, 520 P.2d 758, 764 (Haw. 1974) (defining duty as "a legal conclusion dependant upon 'the sum total of those considerations of pol-

Pennsylvania stated when “deci[ding] whether or not there is a duty, many factors interplay: The hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall.”¹²⁶ When determining duty of care in negligence cases, courts consider every possible public policy that may escalate the risk of death or injury, including heightened pressures to succeed and the effects of group psychology.¹²⁷ In this sense, courts commonly balance moral and ethical considerations, weighing the nature of the relationship, the gravity of the harm, and the reprehensibility of the defendant’s conduct.¹²⁸

If there is a potential economic gain for the defendant, the court will consider if the defendant must protect the plaintiff in some way because of that economic motivation.¹²⁹ For example, the National Collegiate Athletic Association (“NCAA”) and college football coaches may deem pre-season workouts “voluntary,” but players know that if they do not participate, they will not secure good positions on the team and could lose their scholarships.¹³⁰ A

icy which led the law to say that the particular plaintiff is entitled to protection’”) (quoting *Rodrigues v. State*, 472 P.2d 509, 518 (Haw. 1970)).

126. *Kleinknecht v. Gettysburg College*, 989 F.2d 1360, 1372 (3d Cir. 1993) (quoting *Gardner v. Consol. Rail Corp.*, 573 A.2d 1016, 1020 (Pa. 1990) (quoting *Sinn v. Burd*, 404 A.2d 672, 681 (Pa. 1979))). “The statement that there is or is not a duty, however, ‘begs the essential question – whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct.’” *Turcotte v. Fell*, 502 N.E.2d 964, 967 (N.Y. 1986).

127. See *Hekmat*, *supra* note 5, at 641 (noting that analysis of public policy considerations in negligence cases “represents the best interests of student athletes”). Public policy exceptions are also common when courts analyze express assumption of risk arguments. See Alexander J. Drago, *Assumption of Risk: An Age-Old Defense Still Viable in Sports and Recreation Cases*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 583, 587 (2002) (noting releases exculpating defendants from liability are void if they are contrary to public policy). If there is unclear language in the contract, a disparity in the plaintiff’s bargaining power, a violation of a statute, or language on the back of a ticket that is not signed by the plaintiff and may not have provided notice, pleas to public policy may defeat an assumption of risk defense. See *id.* at 587-89 (giving examples of cases where courts have invalidated assumption of risk defenses in such situations).

128. See *Hekmat*, *supra* note 5, at 640 (depicting courts analysis of public policy arguments).

129. See *id.* (explaining defendant may have heightened duty to curtail risks to plaintiff if defendant’s economic position caused plaintiff to assume defendant would be curtailing risks). In some jurisdictions, this policy consideration is called inherent compulsion, and serves as a rebuttal to the assumption of risk defense. See *Meier*, *supra* note 42, at 114 (characterizing possible rebuttal to assumption of risk defense). For a further discussion of inherent compulsion, see *infra* notes 162-201 and accompanying text.

130. See *Hekmat*, *supra* note 5, at 641 (reflecting recent concerns within NCAA).

court in this case will not ignore the actual obligation demanded by the NCAA coach, but instead will recognize an actual duty in that "voluntary" practice.¹³¹

C. Assumption of Risk Defense

Defendants assert the assumption of risk affirmative defense when the plaintiff voluntarily engages in an athletic or recreational activity involving obvious risks.¹³² A plaintiff is deemed to have assumed the risk when the plaintiff "voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant."¹³³ A defendant owes no duty of care to a plaintiff who voluntarily participates in a sport with respect to the obvious risks involved.¹³⁴ With regard to sport negligence cases, Justice Cardozo said, "the timorous may stay at home."¹³⁵

To determine whether a plaintiff assumed the risk, courts use a subjective standard to decide what risks were "known, apparent or reasonably foreseeable consequences" of the plaintiff's participa-

131. *See id.* "[I]t's time we stop shuffling around [the universities'] culpability for the sake of protecting this cherished notion of football's tough-guy culture. When that culture turns deadly, we must hold accountable its keepers." *Id.* (alterations in original).

132. *See Drago, supra* note 127, at 583 (noting assumption of risk defense applicable in both professional and amateur sports). Drago hypothesized that the following questions would be asked to ascertain if an assumption of risk doctrine could be applied in the Stringer wrongful death suit:

As a professional athlete, did the decedent have the requisite knowledge that his continuing to practice increased the likelihood of injury? Did the decedent have the ability to remove himself from practice if he felt ill, or if he believed the weather conditions increased the chance of a medical emergency? Are severe medical afflictions – and even death – risks that are inherent in the violent and intense world of professional football? Were those risks increased by the actions or inactions of the defendants?

Id. at 608.

133. *Id.* at 583-84 (quoting RESTATEMENT (SECOND) OF TORTS § 496A (1977)); *see also* Meier, *supra* note 42, at 108 (defining assumption of risk). The Restatement (Second) of Torts Comments to § 496 identify four different definitions of assumption of risk that have been recognized by courts. *See Drago, supra* note 127, at 584 (quoting RESTATEMENT (SECOND) OF TORTS § 496A, cmt. c (1977)). Comment c(1) defines assumption of risk as when a plaintiff expressly consents to release the defendant of any obligation of care. *See id.* Comment c(2) defines assumption of risk as when a plaintiff voluntarily enters into an activity knowing that it involves some risks, and thereby has implicitly assumed risk. *See id.* Comment c(3) defines assumption of risk as when a plaintiff, knowing that the defendant has negligently caused a dangerous situation, continues voluntarily to participate and face that risk. *See id.* Comment c(4) defines assumption of risk as when a plaintiff unreasonably, but voluntarily, encounters a risk. *See id.*

134. *See Drago, supra* note 127, at 590 (observing outcome when plaintiff has acted voluntarily).

135. *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (N.Y. 1929) (describing risk plaintiff took in decision to ride amusement park attraction).

tion.¹³⁶ Courts traditionally apply the assumption of risk doctrine when the plaintiff “reasonably underst[ands] and appreciate[s] the dangers inherent in the game.”¹³⁷ Some courts recognize that a plaintiff’s appreciation for the risks of a sport will depend upon the plaintiff’s knowledge and experience in that sport.¹³⁸ Specifically, courts assume that professional athletes understand the risks of their sport better than their amateur counterparts and accept more risks because they receive a salary.¹³⁹

In addition to the foreseeability requirement, the plaintiff’s actions must also be voluntary to meet the assumption of risk doctrine.¹⁴⁰ “[T]he common law does not assume to protect [the plaintiff] from the effects of his own personality and from the consequences of his voluntary actions or of his careless misconduct.”¹⁴¹ To determine voluntariness, courts examine the plaintiff’s conduct.¹⁴²

Courts use the assumption of risk doctrine inconsistently, and because of the confusion among the courts, many have suggested abandoning the doctrine.¹⁴³ Courts, however, remain reluctant to

136. See *Turcotte v. Fell*, 502 N.E.2d 964, 967 (N.Y. 1986) (exploring scope of plaintiff’s consent); see also Meier, *supra* note 42, at 108 (referring to RESTATEMENT (SECOND) OF TORTS § 496A, cmt. d).

137. Lewis, *supra* note 36, at 285 (discussing that more modern courts have not as readily applied assumption of risk doctrine when there may be reckless or intentional conduct on part of defendant). See generally *Marchetti v. Kalish*, 559 N.E.2d 699, 704 (Ohio 1990) (dismissing plaintiff’s negligence claim in game of “kick the can” because defendant did not act recklessly or intentionally and plaintiff assumed risks by participating in game).

138. See *Turcotte*, 502 N.E.2d at 968 (deciding how to analyze claim that defendant jockey “foul ridden” during horse race and caused plaintiff jockey’s injury).

139. See *id.* (describing analysis of professional athlete’s consent to risks in sport); see also *McElhaney v. Monroe*, 1989 Ohio App. LEXIS 366, at *7 (Ohio Ct. App. Feb. 1, 1989) (explaining foreseeable risks that football participants consent to include normal risks attendant to bodily contact); Drago, *supra* note 127, at 593 (portraying presumption that professional athletes are more willing to accept these risks in exchange for his or her salary).

140. See Meier, *supra* note 42, at 108 (referencing RESTATEMENT (SECOND) OF TORTS § 496E(1) which states “plaintiff does not assume a risk of harm unless he voluntarily accepts the risk”).

141. *Id.* at 107 (citing Francis H. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 14 (1906)).

142. See *id.* at 108 (discussing in late 19th Century, employees were held to have voluntarily assumed risks inherent in their jobs). “Discontent [with the assumption of risk doctrine] . . . emerged [from] ‘a growing recognition of the reality of the forces which pretty much coerced a workman to continue in one employment or another with its various attendant dangers It was ‘[the worker’s] poverty, not his will’ which consented.” *Id.*

143. See *Knight v. Jewett*, 834 P.2d 696, 699 (Cal. 1992) (describing history of confusion with assumption of risk doctrine); Meier, *supra* note 42, at 105-06 (attributing confusion to assumption of risk doctrine’s multiple reformulations).

abandon the assumption of risk doctrine altogether, particularly in sports-related cases.¹⁴⁴ Instead, many states have passed comparative negligence statutes.¹⁴⁵

In comparative negligence statutes, assumption of risk is no longer an absolute defense; instead, courts apportion the incurred risk between the plaintiff and defendant using a factual inquiry.¹⁴⁶ Now, the duty of care "owed to [a] plaintiff in [a] professional sporting event . . . must be evaluated by considering the risks plaintiff assumed when he elected to participate in the event."¹⁴⁷

1. *General Application of the Assumption of Risk Doctrine*

The landmark case for modern application of the assumption of risk doctrine is *Knight v. Jewett*.¹⁴⁸ In that case, the plaintiff's little finger was amputated after the defendant stepped on her hand during an informal game of "touch" football.¹⁴⁹ The court explained that traditionally, an assumption of risk analysis would be used to either define the limits of the defendant's duty or to decide if the plaintiff "knowingly and voluntarily . . . chose[] to encounter the specific risk of harm posed by the defendant's duty."¹⁵⁰ The court noted, however, that these varied tort definitions of assumption of risk resulted in confused and varied applications of the doctrine.¹⁵¹ The court stated that by adopting a comparative fault statute, Cali-

144. See Meier, *supra* note 42, at 106 (discussing prevalence of assumption of risk doctrine). The assumption of risk doctrine may be applied in situations that are not direct competition, but nonetheless sports related. See Drago, *supra* note 127, at 608 (noting that "the defense of assumption of risk is only limited by our ability to devise new ways to entertain ourselves"). Most assumption of risk defenses in sports contexts are implied. See *id.* at 590 (contrasting express assumption of risk defenses, used when plaintiff has signed contract or has otherwise expressly agreed to accept risk arising from defendant's negligent conduct).

145. See *Turcotte v. Fell*, 502 N.E.2d 964, 967 (N.Y. 1986) (noting enactment of New York's comparative negligence statute); see also *King v. Univ. of Indianapolis*, NA 01-233-C-B/H, 2002 U.S. Dist. LEXIS 19070, at *14 (S.D. Ind. Oct. 3, 2002) (noting Indiana's adoption of comparative negligence statute); *Knight*, 834 P.2d at 700 (referencing California's adoption of comparative fault statute).

146. See *King*, 2002 U.S. Dist. LEXIS 19070, at *14 (describing Indiana's comparative negligence statute).

147. *Turcotte*, 502 N.E.2d at 967 (describing analysis under comparative negligence concept).

148. 834 P.2d 696 (Cal. 1992).

149. See *Knight*, 834 P.2d at 697-98 (explaining facts of case). At one point during play, the plaintiff "told defendant 'not to play so rough or [she] was going to have to stop playing.'" *Id.* at 697 (testifying to level of play in game).

150. *Id.* at 699-700 (noting how past assumption of risk cases were largely decided).

151. See *id.* at 699 (referring to "leading tort treatises" admission of doctrine's confusion).

fornia rejected the absolute defense of the assumption of risk doctrine and instead embraced a system where “the extent of fault should govern the extent of liability [because this] remains irresistible to reason and all intelligent notions of fairness.”¹⁵²

The court disagreed with lower courts that distinguish between the plaintiff’s assumption of risk being “reasonable” or “unreasonable” to decide whether the plaintiff could bring his or her claim against the defendant.¹⁵³ Instead, the court instructed that a “primary”/“secondary” assumption of risk distinction be used:

First, in “primary assumption of risk” cases – where the defendant owes no duty to protect the plaintiff from a particular risk or harm – a plaintiff who has suffered such harm is not entitled to recover from the defendant, whether the plaintiff’s conduct in undertaking the activity was reasonable or unreasonable. Second, in “secondary assumption of risk” cases – involving instances where the defendant has breached the duty of care owed to the plaintiff – the defendant is not entitled to be entirely relieved of liability for an injury proximately caused by such breach, simply because the plaintiff’s conduct in encountering the risk of such an injury was *reasonable* rather than unreasonable. Third and finally, the question whether the defendant owed a legal duty to protect the plaintiff from a particular risk of harm does not turn on the reasonableness or unreasonableness of the plaintiff’s conduct, but rather on the nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport.¹⁵⁴

152. *Id.* at 700 (quoting *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1230-31 (Cal. 1975)) (emphasis omitted). Much of the *Knight* decision redefined the court’s prior holding in *Li*, that the comparative fault statute subsumed, or merged, the traditional assumption of risk concept, and did not require courts to first decide if traditional assumption of risk by the plaintiff barred the use of the comparative negligence statute. See *Knight*, 834 P.2d at 701 (“[T]he *Li* decision clearly contemplated that the assumption of risk doctrine was to be partially merged or subsumed into the comparative negligence scheme. Subsequent Court of Appeal decisions have disagreed, however . . . as to what category of assumption of risk cases would be merged”) (emphasis and citations omitted).

153. See *id.* at 704 (acknowledging that although difference between primary/secondary and reasonable/unreasonable seems semantic, it carries legal significance).

154. *Knight*, 834 P.2d at 704 (explaining why “reasonable”/“unreasonable” distinction “is more misleading than helpful”).

Because the defendant was a mere co-participant of the plaintiff and did not owe her any duty, the court held that the assumption of risk was "primary," and therefore, comparative fault principles were inapplicable.¹⁵⁵ The court upheld summary judgment for the defendant, explaining that while the defendant may have been careless or negligent in his actions, he did not act with intent to injure.¹⁵⁶

2. *Application of Assumption of Risk in Heat Exhaustion Cases*

The relevant case demonstrating the assumption of risk application in heat exhaustion cases is *King v. University of Indianapolis*.¹⁵⁷ In that case, a sophomore college student suffered heat stroke and died during the first football practice of the fall.¹⁵⁸ Before starting the practices, King signed a form entitled "Assumption of Risk" in which he specifically assumed all risks and liability for injuries resulting from his participation in the football program.¹⁵⁹ The court, denying the defendants' motion for summary judgment, held that the expressed assumption of risk contract did not include the university's possible negligence, and therefore, the plaintiff did not expressly waive claims resulting from the university's alleged negligent conduct.¹⁶⁰ The court also disagreed with defendants' argument that by signing the "Assumption of Risk" contract, King "'manifested consent to voluntarily expose himself to the risk of harm,' thus 'relieving them of a duty' of care."¹⁶¹ The court said that King could only consent to assume risks that he possessed an actual knowledge and appreciation of which excluded "forces other than those inherent in the game of football, specifically Defendants' negligence in failing to provide for King's safety and protection from potentially dangerous conditions"¹⁶²

155. *See id.* at 712 (concluding defendant did not breach any duty of care owed to plaintiff).

156. *See id.* at 711-12 (denoting intent to injure necessary for defendant's actions to be "so reckless as to be totally outside the range of the ordinary activity involved in the sport").

157. 2002 U.S. Dist. LEXIS 19070 (Oct. 3, 2002).

158. *See King*, 2002 U.S. Dist. LEXIS 19070, at *3-4 (describing facts of case).

159. *See id.* at *2-3 (describing factual background).

160. *See id.* at *13 (explaining that "Assumption of Risk" contract did not sufficiently shift risk of negligence).

161. *See id.* (quoting defendant's reply brief in support of summary judgment).

162. *Id.* at *15 (requiring factual questions regarding comparative negligence be decided by reasonable jury).

D. Inherent Compulsion Rebuttal to the Assumption of Risk Defense

A rebuttal to the assumption of risk doctrine, the theory of inherent compulsion states that an assumption of risk does not shield liability when the compulsion of a superior overcomes the plaintiff's voluntariness in a situation.¹⁶³ Two elements demonstrate that an inherent compulsion existed.¹⁶⁴ First, the superior or coach directed the player to act.¹⁶⁵ Second, an economic compulsion or other circumstance existed that would compel the player to act accordingly.¹⁶⁶ Currently, New York is one of the only jurisdictions to recognize inherent compulsion, although plaintiffs have asserted it in other states.¹⁶⁷

1. General Application of the Inherent Compulsion Doctrine

New York introduced and interpreted the inherent compulsion theory in *Benitez v. New York City Board of Education*.¹⁶⁸ There, the plaintiff, the star of a football team, was injured as a result of playing against superior competition.¹⁶⁹ The plaintiff argued that the defendant negligently allowed the unreasonable "mismatch" and additionally allowed the plaintiff to play the entire game, making him tired and susceptible to injury.¹⁷⁰ The New York Supreme

163. See Meier, *supra* note 42, at 114 (characterizing possible rebuttal to assumption of risk defense).

164. See *id.* (listing factors courts consider when analyzing inherent compulsion).

165. See *id.* (depicting first criteria for inherent compulsion).

166. See *id.* (depicting second criteria for inherent compulsion).

167. See *Benitez v. N.Y. City Bd. of Educ.*, 541 N.E.2d 29, 33 (N.Y. 1989) (defining inherent compulsion theory); see also *Vecchione v. Middle Country Cent. Sch. Dist.*, 752 N.Y.S.2d 82, 84 (N.Y. App. Div. 2002) (holding no inherent compulsion in student-plaintiff's fall on wet tennis court); *Salvierra v. Havekotte*, 709 N.Y.S.2d 120, 121 (N.Y. App. Div. 2000) (affirming jury finding that housekeeper under inherent compulsion when injured); *Dobski v. City of Schenectady*, 706 N.Y.S.2d 777, 778-79 (N.Y. App. Div. 2000) (ordering new trial when lower court did not provide inherent compulsion jury instruction, yet overturned jury verdict on inherent compulsion grounds); *Weber v. William Floyd Sch. Dist.*, 707 N.Y.S.2d 231, 232 (N.Y. App. Div. 2000) (noting no application of inherent compulsion theory); *Picardo v. N. Patchogue Medford Youth Athletic Assoc., Inc.*, 569 N.Y.S.2d 186, 186 (N.Y. App. Div. 1991) (finding insufficient evidence for inherent compulsion to negate assumption of risk); Meier, *supra* note 42, at 114 (noting although unsuccessful, plaintiffs have pursued inherent compulsion theory in states other than New York).

168. See *Benitez*, 541 N.E.2d at 33 (explaining inherent compulsion theory).

169. See *id.* at 30-31 (illustrating facts of case).

170. See *id.* at 31 (reciting plaintiff's allegations that defendant was negligent for "allowing GW to play the JFK game in the face of an obvious mismatch; and allowing him to play virtually the entire first half of the game without adequate rest").

Court agreed with the plaintiff, finding that the defendant unreasonably enhanced the chance of injury by allowing the "mismatch" to occur.¹⁷¹ Moreover, the court held that the plaintiff participated in the game because of an inherent compulsion: the plaintiff wanted a college scholarship that the coach had influence over, and the plaintiff knew that the coach wanted him to play against the more skilled competition.¹⁷² The dissent, however, argued that the plaintiff played entire football games before and knew that fatigue was an inherent risk in playing football.¹⁷³

On appeal to the New York Court of Appeals, the court agreed with the dissent and reversed the judgment.¹⁷⁴ The court confirmed that the inherent compulsion theory could be used when "the element of voluntariness is overcome by the compulsion of a superior."¹⁷⁵ In this particular case, however, the court found an insufficient showing that the plaintiff's potential scholarship made him feel as if he had to play despite his concern that the teams were mismatched.¹⁷⁶

Although not specifically labeled as inherent compulsion, Ohio courts recently discussed similar legal concepts as applied to employees in *Snider v. Clermont Central Soccer Association*.¹⁷⁷ There, the plaintiff, a referee, was injured during a game in inclement weather before which he was told by the defendant "to go on that day no matter what."¹⁷⁸ The Ohio court recognized that it was unrealistic to hold that employees' decisions to encounter or avoid risks are voluntary.¹⁷⁹ Under the assumption of risk doctrine, however, the court dismissed the plaintiff's claim, finding that the defendant could not force the plaintiff to continue the game in

171. See *id.* at 32 (describing rationale in lower court's affirmation of jury decision).

172. See *id.* (describing holding of appellate division); see also Drago, *supra* note 127, at 602 (articulating inherent compulsion aspect of case).

173. See *Benitez*, 541 N.E.2d at 32 (summarizing dissent's view in lower court).

174. See *id.* (reversing holding and dismissing complaint).

175. See *id.* at 33 (defining inherent compulsion).

176. See *id.* at 34 ("In sum, plaintiff Benitez failed to present any evidence that he had no choice but to follow the coach's direction to play despite his concern over enhanced risk factors known by or communicated to the coach."). The court went on to state that "[f]atigue . . . [is] inherent in . . . football" and that the case "was a luckless accident arising from the vigorous voluntary participation in competitive . . . athletics." *Id.*

177. No. CA98-07-056, 1999 Ohio App. LEXIS 1126, at *3 (Ohio Ct. App. Mar. 22, 1999).

178. See *Snider*, 1999 Ohio App. LEXIS 1126, at *2 (describing facts of case).

179. See *id.* at *11 (describing holding in *Cremeans v. Willmat Henderson Mfg. Co.*, 566 N.E.2d 1203 (Ohio 1991) as described in *Syler v. Signode Corp.*, 601 N.E.2d 225, 228 (Ohio Ct. App. 1992)).

dangerous conditions.¹⁸⁰ To support the decision that the referee acted voluntarily, the court pointed to evidence showing that the defendant paid the plaintiff only eight dollars an hour, and that the plaintiff actually relied on a full-time job as his livelihood.¹⁸¹

2. Possible Applications in "Football Culture" Cases

To introduce her reflections on the relationship between the law and culture, Associate Professor of Law Naomi Mezey recently wrote that "[t]he notion of culture is everywhere invoked and virtually nowhere explained."¹⁸² She included within the latter assertion that culture is nowhere explained within the area of law.¹⁸³ The few cases presented here, whose facts give rise to issues about the culture of football, have unfortunately not been resolved under a negligence analysis, but have been resolved on other grounds.¹⁸⁴ In resolving such cases on other grounds, the courts have successfully avoided answering if a defendant has a duty to maintain an appropriate "culture," or if inherent compulsion is just a legal term signaling an improper "culture."¹⁸⁵

In *Ellis v. Rocky Mountain Empire Sports, Inc.*,¹⁸⁶ the plaintiff, a NFL first round draft pick for the Denver Broncos, alleged that the team negligently required him to engage in contact football drills before he had fully recovered from an off-season knee injury, resulting in further injury to his knee.¹⁸⁷ The court first held that Ellis had to arbitrate the case under the standard player contract that he signed with the NFL member team.¹⁸⁸ The court then added that

180. See *id.* at *12 (denying that defendant could control plaintiff's actions).

181. See *id.* (noting "the economic necessity of undertaking dangerous risky tasks imposed upon employees is not similarly imposed upon independent contractors") (quoting *Maier v. Scollard*, 1993 Ohio App. LEXIS 502, *7 (Ohio Ct. App. Jan. 29, 1993)).

182. Naomi Mezey, *Approaches to the Cultural Study of Law: Law as Culture*, 13 YALE J.L. & HUMAN. 35, 35 (2001) (explaining that "[c]ulture can mean so many things").

183. See *id.* at 35-36 (asserting it is wrong that cultural acts are frequently held to have no legal significance and legal acts are frequently held to have no cultural significance).

184. For examples of the legal rationale that avoids answering cultural questions, see *infra* notes 186-201 and accompanying text.

185. For examples of the legal rationale that avoids answering cultural questions, see *infra* notes 186-201 and accompanying text.

186. 602 P.2d 895 (Colo. Ct. App. 1979).

187. See *Ellis*, 602 P.2d at 896 (describing facts and allegations of complaint). For further discussion of NFL players being pressured to play with injury, see *infra* notes 226-37 and accompanying text.

188. See *Ellis*, 602 P.2d 896-97 (denying argument that arbitration clause unconscionable).

workers' compensation provided Ellis's only remedy.¹⁸⁹ In response, Ellis tried to argue that he was exempt from the exclusivity clause of workers' compensation because his claim encompassed the intentional tort of intentional infliction of emotional distress.¹⁹⁰ The court responded that because the alleged intentional tort stemmed from co-employees hitting him in practice and not from an act by the Broncos organization itself, Ellis did not avoid the workers' compensation's exclusivity clause.¹⁹¹ Ellis failed to show that the Broncos' action of putting him back into practice before his knee had healed constituted an intentional tort.¹⁹² Because the court barred Ellis from his tort action, he could not argue that the Broncos were negligent in pressuring him to return to practice after an injury, a problem commonly cited within the culture of football.¹⁹³

As previously discussed, a high school student was rendered paraplegic after weights fell on him during a football tryout in *Vargo v. Svithchan*.¹⁹⁴ There, the court held that state immunity did not protect the school principal from liability because he was responsible for minimizing "overexertion and resultant injuries . . . foreseeable and frequent in the absence of proper supervision."¹⁹⁵ Similarly, state immunity did not protect the athletic director because he was responsible "to oversee the practices," "promulgate[] reasonable safety precautions," and "minimize[] injury to the students."¹⁹⁶ This holding signals that the Michigan court holds third parties beyond just the coaching staff responsible for the *culture* of a high school football program where those parties have some level of control over the program.¹⁹⁷

The Michigan court did not speculate as to what part of the football program the principal and athletic director may have negli-

189. *See id.* at 898 (confirming exclusivity of workers' compensation laws). For more on workers' compensation exclusivity, see *supra* notes 32-38 and accompanying text.

190. *See Ellis*, 602 P.2d at 898 (rejecting Ellis's attempt to avoid workers' compensation statutes).

191. *See id.* (holding Ellis had no right to negligence claim).

192. *See id.* Ellis did not include the NFL as a defendant in this suit, and if he subsequently tried to sue the NFL for his injury, the case is not recorded. *See id.*

193. For more discussion about the pressure on football players to play injured, see *infra* notes 226-37 and accompanying text.

194. *Vargo v. Svithchan*, 301 N.W.2d 1, 3 (Mich. Ct. App. 1980) (describing facts).

195. *Id.* at 5 (denying principal-defendant immunity and remanding case to decide principal's negligence).

196. *Id.* at 5 (remanding case to decide if athletic director negligent).

197. *See id.* (describing roles of principal and athletic director).

gently supervised and controlled.¹⁹⁸ The court specifically noted, however, that the injury occurred during football tryouts and that the plaintiff alleged that the principal and athletic director “allowed [the coach] to abuse students and to threaten and pressure them into attempting athletic feats beyond their capabilities,” even after the principal allegedly “receiv[ed] a complaint and notice that [the coach] was ‘too rough’ on his prospective football players.”¹⁹⁹

Because the plaintiff was trying out for the team, a New York court might have applied an inherent compulsion theory.²⁰⁰ First, the superior directive would be that the coach directed participation in a weight lifting session as part of the tryout, which implicitly meant lifting as much weight as possible.²⁰¹ Second, it would be argued that scholarships and the chance to play professional football at least partly economically motivates high-school boys, albeit indirectly.²⁰²

IV. ANALYSIS

Legal analysts believe that Ms. Stringer’s negligence lawsuit against the NFL will be difficult, but not impossible, to win.²⁰³ The allegation that the NFL condones a “deadly culture” is the most challenging claim in the multi-layered lawsuit.²⁰⁴ This difficulty exists because definitions and perceptions of “culture,” or any subset

198. *See id.* (describing general roles of principal and athletic director).

199. *Vargo*, 301 N.W.2d at 3-5 (describing facts).

200. For a discussion of inherent compulsion, see *supra* notes 163-81 and accompanying text.

201. For a discussion of the first element of the inherent compulsion theory, see *supra* note 165 and accompanying text.

202. For a discussion of the second element for the inherent compulsion theory, see *supra* note 166 and accompanying text.

203. The latest Stringer lawsuit against the NFL “will be an uphill battle,” but is not impossible, according to Eldon Ham, adjunct professor of sports law at Chicago-Kent College of Law. Mike Freeman, *Widow Plans to Intensify Her Battle With the N.F.L.*, N.Y. TIMES, July 23, 2003, § 8, at 5 [hereinafter *Plans to Intensify*]. Because a Minnesota Court has dismissed the Vikings suit, and because Stringer is the only heat-related death in the NFL’s history, it will “be very difficult to show how the NFL is liable” according to Jeffrey Rosenthal, chair of the NY bar association’s Entertainment Arts and Sports Law section. Bob Velin, *Widow sues NFL for death of Stringer*, USA TODAY.COM, at http://www.usatoday.com/sports/football/nfl/2003-07-29-stringer-suit_x.htm (last visited Dec. 1, 2004) (explaining that Rosenthal believes Stringer will have to show that NFL created knowingly dangerous situation that led to Stringer’s death).

204. The suit alleges that the “National Football League training camps are modern-day sweat shops” and training camp conditions “not only are condoned and perpetuated by the National Football League, but also ingrained in its culture, a perverse and deadly culture that the League tolerates, fosters, and even markets.” *Complaint*, *supra* note 11, at 2-3.

of culture, varies vastly depending on individual understandings of the concept.²⁰⁵

A. The Culture Debate

ESPN recently highlighted the NFL's culture in a television series entitled *Playmakers*, which averaged 2.2 million viewers each week.²⁰⁶ Among many other scenarios, *Playmakers* depicted one football player addicted to crack, another arrested for assaulting his wife, and yet another pressured into playing with an injury.²⁰⁷ The NFL successfully pressured ESPN to cancel the show.²⁰⁸ On February 5, 2004, ESPN cancelled their hit show in order to keep the NFL as a business partner.²⁰⁹

The ESPN television series is not the only one questioning the NFL's culture. Kelci Stringer alleges that the NFL has a "perverse, insidious and deadly culture . . . which unreasonably subjects players to heat-related illness during practices."²¹⁰ While it is unclear if the court will view this claim as a duty of care argument or a public policy argument, it is clear that at the heart of this claim is the culture of football, the source of significant current debate.

1. *Elite Sport Needs Athletes to Give 110%*

Traditionalists, loyal to the game of football, say that more than any other sport, football players must consistently test their limits.²¹¹ They argue that athletes must "maintain the absolute

205. See Mezey, *supra* note 182, at 39-40 (asserting culture is complex concept).

206. Joe Flint, *ESPN's Risky New Game Plan: Relying Less on Pro Sports*, WALL ST. J., Oct. 24, 2003, at A1, A11.

207. See *id.* (describing show).

208. See *id.* Pat Bowlen, who negotiates NFL television contracts, said the show was "horrible" and that "he [couldn't] understand why ESPN, which has profited from its relationship with pro football, would 'go out and crap all over the product.'" *Id.* at A1. Although it seems that ESPN might be taking a cue from the realities of professional football, the creator of *Playmakers*, John Eisendrath, denied this, saying that he is creating fiction. Mark Shapiro, ESPN's programming chief, claims "[ESPN's] fans don't think that 'Playmakers' is the NFL anymore than they think 'The West Wing' is George Bush's White House." *Id.* at A11.

209. See Connor Ennis, *ESPN Cancels 'Playmakers'*, at <http://www.detnews.com/2004/lions/0402/05/lions-55967.htm> (Feb. 5, 2004) (noting NFL is "a long-time - and lucrative - partner" to ESPN). Mark Shapiro, ESPN's programming chief, said about the cancellation that "[t]o go ahead with a second season . . . would be rubbing it in the faces of our most important client." *Id.*

210. *Unusual Woman*, *supra* note 3, at D2 (describing key argument in complaint).

211. See Meier, *supra* note 42, at 144 (arguing football players pushing physical limitations is part of embraced attitude in America).

peak physical condition that they believe necessary [] to brilliantly excel at a job”²¹² The common sentiment among traditionalists is that although there is a high level of physical rigor, professional football players accept pain and the high risk of injury for financial rewards.²¹³

Modern society celebrates football coaches who use extreme behavior to train athletes and win football championships.²¹⁴ Winning coaches who have the ability to motivate athletes to perform at their peak potential are greatly admired and compensated, despite using coaching techniques that could be deemed wanton or grossly negligent by legal standards.²¹⁵ Bear Bryant, generally regarded as one of the greatest college football coaches of all time, had seventy-six of his one hundred players quit because of harsh practice conditions, including Bryant kicking a player after he collapsed due to heat exhaustion.²¹⁶ Vince Lombardi, also generally regarded as one of the greatest NFL coaches of all time, put his players through “‘ungodly’ conditioning workouts,” driving players to the point that they collapsed from heat exhaustion.²¹⁷

212. See Kreidler, *supra* note 3 (“[A]s much as it would comfort some people to be able to find someone or something to blame for Stringer’s death, the truth may prove far too elusive for that kind of formula. It just isn’t that simple. Elite athletes push . . .”).

213. See Meier, *supra* note 42, at 154 (asserting Stringer “took on risks, but surely the bargain reflected in the \$18.4 million contract extension and the \$4 million signing bonus that he received . . . includ[ing] some compensation for . . . tak[ing] those risks”).

The reality, however, is that while some make millions, over half of all NFL players earn less than \$500,000 a year. See Randall, *supra* note 3 (emphasizing that because football players cause such damages to their bodies, their careers are much shorter than normal careers). Stringer’s attorney has commented on the NFL culture: “Frankly, it’s no coincidence that the average football player in the NFL plays for four and a half years. They use them up and spit them out.” Freed, *supra* note 3. Furthermore, even if a NFL salary compensates for the risk of injury that occurs from direct hits during games, some do not believe the exchange of money for risk acceptance ever includes acceptance of death at a practice. See Patrick, *supra* note 2 (noting that “Stringer was only practicing He wasn’t preparing for the Super Bowl [D]ying from heat stroke in training camp wasn’t part of the deal”).

214. See Hurst & Knight, *supra* note 32, at 29 (characterizing America’s perception of football).

215. See *id.* at 28 (noting that Bear Bryant and Vince Lombardi are considered two of greatest football coaches ever, and are admired despite their legendary harsh coaching).

216. See *id.* at 28-29. Bear Bryant’s legendary training camp is chronicled in the book *THE JUNCTION BOYS*, which describes water breaks needing to be earned, and players throwing up all over the place. See generally Patrick, *supra* note 2 (questioning football camp training conditions).

217. See Hurst & Knight, *supra* note 32, at 29; see also Hekmat, *supra* note 5, at 613 (quoting Vince Lombardi as saying “[f]atigue makes cowards of us all”). But see, e.g., Kristina Rico, Note, *Excessive Exercise as Corporal Punishment in Moore v.*

Furthermore, some academics who study the intersection of sports and society assert that football reflects the American value system.²¹⁸ Achievement through hard work and perseverance underpins the "Spirit of Capitalism" and the very foundation of America's prominence.²¹⁹ Sports in early American history were regarded as "character-building activities" that instilled in athletes the same work ethic needed in the labor force to "continually raise the level of our achievement."²²⁰ Sports also put the "American Dream" on display, showing that "successful performance results in social mobility" and instilled discipline, which led to greater achievements in education.²²¹ Of all the sports in America, football is believed to best promote these lessons and culture.²²²

2. *Elite Sport at What Cost?*

Other critics believe that this expectation for football players to push past physical limitations goes too far. Athletes are expected to display "superhuman-hero" feats, and play "hurt, sick or fatigued."²²³ There is a stigma that if athletes do not give 110%, NFL players lose their positions on the team.²²⁴ This stigma blurs the

Willis Independent School District – *Has the Fifth Circuit "Totally Isolated" Itself in its Position*, 9 VILL. SPORTS & ENT. L.J. 351, 386 (2002) (noting Lombardi's sentiment that "winning is not everything . . . it's the only thing" hurts athlete-coach relationship). "Coaches must resist the forces of society and the media encouraging them to win at all costs, while becoming clearer about their coaching objectives." *Id.* at 386 n.225.

218. See Meier, *supra* note 42, at 145 (finding football holds important role in American society).

219. See *id.* at 144 (proposing football strengthens capitalism).

220. See *id.* at 148 (quoting BERO RIGAUER, *SPORT AND WORK* 27 (Allen Guttman trans., Columbia Univ. Press 1981) (1969)).

221. See *id.* at 149 (articulating football's contributions to America's development).

222. See *id.* at 150-53 (dismissing harshest critics of football because they are also critics of American values reflected in football: "achievement, competition, duty to a calling, and capitalism").

223. Rico, *supra* note 217, at 351 (contrasting excessive force commonly used to coach today's athletes with limited, reasonable force teachers are allowed to use when disciplining students). See generally Richard E. Lapchick, *Dying for the Game*, NE. U. CTR. FOR THE STUDY OF SPORT IN SOC'Y, at <http://www.sportsinsociety.org/rel-article22.html> (last visited Dec. 1, 2004) (noting athletes ignore risks involved in sports).

224. See Rico, *supra* note 217, at 385 n.221 ("[T]he game, whatever sport it may be, 'is no longer in its purest form and won't be again - until athletes stop abusing their bodies to avoid losing their status on the team, hurting their ego, or quite possibly, losing their job.'") (quoting Edmond Ball, *Hot and Bothered: Are Today's Athletes Pushing Themselves Too Much*, MEDIA CHALLENGE HOT CORNER, at <http://www.mediachallenge.com/hotcorner/> (Aug. 31, 2001)).

line of what are “voluntary” assumptions of risk.²²⁵ The prospect that athletes may lose their jobs if they do not give 110% casts doubt on whether football players actually “voluntarily” assume the risks they take in expending this extra, and sometimes dangerous, effort.²²⁶

Because team cohesion leads to more wins, coaches strive to create a collective team identity by promoting interdependence among players.²²⁷ The message is that all players must sacrifice their personal desires and overcome their reservations to achieve the goal of the team.²²⁸ The resulting team-oriented mentality leads the individual players to push beyond personal limits, perhaps leading them to participate in dangerous and risky activities they would not otherwise accept.²²⁹ Teammates also motivate each other during practices to push harder, in spite of visible signs of exertion or failing health.²³⁰

This “distorted team concept,” however, has many negative consequences. First, players are disciplined if they speak out against fellow teammates or the culture of the team.²³¹ Following Stringer’s death, NFL players discussed their reluctance to freely

225. See Lemons, *supra* note 5, at 12 (proposing football’s culture has diluted voluntariness of participation). For example, although the NCAA forbids off-season practices, all college football players know that off-season “voluntary” practices are important “boot camps” and not attending is highly detrimental to securing a starting position. These practices are very dangerous, as no medical supervision is present, or else it would be considered a sanctioned practice. See *id.* College football programs see “voluntary” off-season practices as necessary to obtain the larger goal: making money. Big money is made through ticket sales (Notre Dame takes in \$3 million per home game on tickets alone), television contracts, and most importantly, bowl games (ABC pays \$71 million to televise the Bowl Championship Series (“BCS”)). See *id.* at 12 n.12.

226. *Id.* at 12.

227. See Hekmat, *supra* note 5, at 639 (analyzing football culture).

228. See *id.* (asserting team pressure present in football).

229. See *id.* at 638-39 (illustrating progression to players pushing past personal limitations). But see Kreidler, *supra* note 3 (finding group mentality helps athletes as “[e]lite athletes push . . . others as well as themselves”).

230. See Hekmat, *supra* note 5, at 639 (describing importance of teammates in football). When Wheeler, the Northwestern safety who died after an asthma attack during practice in the summer of 2001, was struggling during practice, “teammates yelled, ‘Let’s go . . . Come on! Keep moving!’” A teammate of Devaughn Darling, the Florida State football player who died during football practice, said that Darling “never quit . . . [a]nd no matter what comes in my life, I won’t quit until I pass out like he did. He gave it everything he had. What a way to go.” *Id.*

231. See Selena Roberts, *The Code of Silence Corrupts the Young*, N.Y. TIMES, Sept. 28, 2003, § 8, at 9 [hereinafter *Code of Silence*] (reporting in recent Mephram High School hazing case, no high school football players would discuss older teammates allegedly sodomizing three j.v. players with broomsticks, golf balls, and pine cones for fear of repercussions). Lawyers have found few players willing to be witnesses in the Korey Stringer case. See *id.*

dissent on workplace conditions.²³² One of the few players to comment on Stringer's death, New York Giants' Lomas Brown said, "[y]ou don't want to show the coaches you're slowing down It's your macho mentality – only the strongest survive."²³³ Seattle Seahawks' Ricky Watters also admitted "[i]t's like, 'I can't afford to be sick.'"²³⁴ From the NFL's annual Rookie Symposium, to day-to-day practices with NFL coaches, the players are "conditioned to refrain from free expression in the workplace often to the detriment of their own health, safety, and lives."²³⁵ The Cincinnati Bengals recently turned this credo into contract, demanding that their player contracts include an addendum that "would allow the team to take away all or part of a player's signing bonus if he publicly criticizes team officials, coaches, or teammates."²³⁶

Second, because professional athletes do not want to lose their teammates' respect, they play with pain, and pressure team doctors to clear them in order to play.²³⁷ Professional team doctors succumb to pressure under this "win at all costs" mentality and often make medical decisions that jeopardize players' health to appease the coach.²³⁸

Third, players put their health at risk by gaining weight to meet NFL expectations frequently included in player contracts.²³⁹ NFL linemen now weigh more than ever in the NFL's history, and many players meet the medical standards of obesity.²⁴⁰ Along with a higher weight comes a higher risk for these players to have heat-

232. See Thomas E. Fielder, *Keep Your Mouth Shut and Listen: The NFL Player's Right of Free Expression*, 10 U. MIAMI BUS. L. REV. 547, 549 (2002).

233. *Id.* (quoting from Jon Saraceno, *Stringer's Death Raises Tough Issues*, USA TODAY, Aug. 2, 2001, at 3C).

234. George, *supra* note 4, at D4.

235. Fielder, *supra* note 232, at 549 (citing NFL superior at Rookie Symposium told rookies to "[k]eep your mouth shut and listen").

236. *Id.* at 549-50 (detailing Cincinnati Bengals player contract).

237. See Justin P. Caldarone, *Professional Team Doctors: Money, Prestige, and Ethical Dilemmas*, 9 SPORTS LAW. J. 131, 133 (2002) (discussing ethical dilemmas faced by athletic trainers and medical staff). Brett Favre, quarterback of the Green Bay Packers, played his 2003 football season with a broken thumb, saying "I always figured if the bone wasn't sticking out of the skin, you could play . . . [as] [t]hat's what they made tape for." Rob Reischel, *Thumbs up: Favre finds way to play*, at <http://www.jsonline.com/packer/News/oct03/180960.asp> (Oct. 29, 2003).

238. See Caldarone, *supra* note 237, at 151 (questioning if Stringer's death could have been prevented, although "one would like to think that the coaches, trainers, and team doctors did not notice the warning signs until it was too late [but] [t]hat . . . is unlikely").

239. See *Culture of Obesity*, *supra* note 82, § 8, at 5 (noting that Stringer's contract demanded he maintain his weight at 335 pounds).

240. See *id.*

related illnesses because as weight increases, so does the tendency to retain heat.²⁴¹

Although it is difficult to ascertain the nexus points between law and culture, the next Section explores the various intersections between the football culture debate and negligence law that may provide successful arguments in the Stringer case.²⁴²

B. Potential Traditional Legal Arguments

To establish that the NFL acted negligently, Ms. Stringer will need to show: first, that the NFL owed a duty to her husband; second, that the NFL breached this duty by condoning a culture that contributes to heat exhaustion injury; third, that this breach of duty actually and proximately caused Stringer's heat exhaustion; and fourth, that Stringer experienced an injury, or, as is in this case, death.²⁴³

1. *The NFL's Duty of Care*

Addressing the NFL's duty owed to Stringer, Ms. Stringer's complaint against the NFL asserts that "[t]he NFL undertakes the overall regulation of the League and its member teams, including scheduling, uniforms, and player health, and generally controls and oversees the game," and "had and has the duty to use ordinary care in overseeing, controlling, and regulating the member clubs' practices, policies, procedures, equipment, working conditions, and culture, insofar as they pertain to and subject players to heat-related illness"²⁴⁴ To prove that the NFL owed a duty of care to Korey Stringer, Kelci Stringer should argue that the NFL had a special relationship to her husband, that the NFL could foresee her husband's death, and that the NFL increased the inherent risks associated with the game of football.

241. See Patrick, *supra* note 2 (recalling Indianapolis Colts general manager Bill Polian has said he doesn't even consider offensive linemen in recent years if they weigh less than 300 pounds); see also George, *supra* note 4, at D4 (quoting Georgia-based doctor that "when a large body is insulated by fat and [his] uniform may be soaked so that the sweat doesn't evaporate, it makes [getting rid of body heat] more difficult").

242. See generally Mezey, *supra* note 182 (describing intersections of culture and law).

243. For discussion of elements in negligence cases, see *supra* notes 42-49 and accompanying text.

244. *Complaint*, *supra* note 11, at 12, 30.

a. Special Relationship

First, unlike the suit against the Vikings, which stumbled because the law limited recovery from an employer, the NFL is not an employer under the new lawsuit; it is instead a third party that sets the procedures and regulations for mandatory team training camps as well as all aspects of professional football.²⁴⁵ In *Kleinknecht*, the Third Circuit held that organizations that decide the rules and equipment used in a sporting event owe reasonable care to athletes who participate in that event.²⁴⁶ The court in *Gehling*, however, held the school had no duty because it neither controlled nor monitored the “fun run.”²⁴⁷ In contrast, among other rules and regulations, the NFL decides what equipment is used in practices and games, sets fines for untucked shirts, slouched socks, and public criticism of referees, and publishes “best practice guides” for all teams to follow.²⁴⁸ There is sufficient evidence for a reasonable

245. See Freed, *supra* note 3.

246. For a discussion of factors impacting duty of care, see *supra* notes 55-80 and accompanying text.

247. See *Gehling v. St. George's Univ. Sch. of Med., Ltd.*, 705 F. Supp. 761, 766 (E.D.N.Y. 1989) (explaining court's rationale).

248. See *Press Release*, *supra* note 14. In response to the events of September 11, 2001, the NFL Commissioner immediately formed a task force to deal with security questions. See *Panel I: Legal Issues in Sports Security*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 349, 352 (2003) [hereinafter *Panel I*]. The task force published a set of best practices for security, referred to as a Best Practices Guide, distributing it to stadium managers and owners to implement. See *id.* Milton Ahlerich, the vice president of security for the National Football League, referred to the players in the NFL as “our most important human resource,” and probably the main motivation for the post-September 11th Best Practices Guide. See *id.* He continued that the NFL was “looking after them and being sure that we are doing everything that we can to protect them” in light of terror concerns. See *id.* at 351. If the NFL put out a Best Practice Guide to ensure safety, and have resources including a security vice-president, a medical advisor, and a Safety and Injury Panel at all, there will be difficulty maintaining that there is no duty of care surrounding heat illness.

Ahlerich believes, however, that it is a common misconception that the NFL is a “hierarchical organization” and that the member clubs always follow the suggested policies. *Id.* at 353. “In actuality, [the Commissioner] has limited authority He can urge, he can write some policies, and if all the owners sign onto it, things can get done.” *Id.*

The room for member club dissidence, however, is questionable. When the Baltimore Ravens' coach recently criticized the NFL referees' use of instant replay, the NFL fined him \$15,000. If the NFL can economically punish member teams that simply criticize their policies, it is unlikely that member clubs stray from NFL policies. See *Ravens hurt twice by questionable reviews*, at <http://sports.espn.go.com/espn/print?id=1647482&type=story> (Oct. 26, 2003) (describing Ravens coach, Brian Billick, looking upwards and saying, “League, I’m sorry. I’ve tried to [hold] the company line”); see also Len Pasquarelli, *Ravens' Coach vented after Bengals loss*, at http://sports.espn.go.com/nfl/columns/story?columnist=pasquarelli_len&id=1651158# (Oct. 31, 2003) (noting NFL fined Billick for his continued public criticism).

jury to find that the NFL makes most decisions surrounding professional football practices and games, and therefore, the NFL owes the players a duty of care.²⁴⁹

Second, in *Kleinknecht*, the school's persistent recruiting of the plaintiff to play lacrosse at their school strengthened the evidence of a special relationship.²⁵⁰ The NFL similarly scouts and offers various incentives to players, indicating a special relationship between the two parties.²⁵¹

Third, although the state immunity statutes that largely decide heat exhaustion cases in public schools do not apply to the Stringer case, the *Vargo* analysis provides guidance on the role of supervisors.²⁵² Like the principal and athletic director in *Vargo*, the NFL is also a supervisor of football coaches, and the court may expect the NFL to oversee the football programs coaches implement as well.²⁵³ Just as the principal and athletic director were found to oversee and control the culture of a football program in *Vargo*, the court here may hold the NFL responsible to oversee and control the culture of the professional football program that carries its name, and may translate that relationship into a broader duty owed to the players.²⁵⁴

b. Foreseeability

First, in *Kleinknecht*, the court found the plaintiff's heart arrhythmia to be within a general class of foreseeable events.²⁵⁵ Heart arrhythmia, however, can happen at almost any time, while heat exhaustion will only happen in high humidity.²⁵⁶ Under this analysis, occurrences of heat exhaustion are more foreseeable.

In addition, heat exhaustion injuries are now more foreseeable than in previous years because modern NFL players, particularly

249. For a discussion on the NFL's duty of care, see *supra* notes 245-48 and accompanying text.

250. See *Kleinknecht v. Gettysburg College*, 989 F.2d 1360, 1366-69 (3d Cir. 1993). But see *Meier*, *supra* note 42, at 104 (arguing that *Kleinknecht* holding turned on inaccessibility to telephone, which should have been for jury to decide).

251. For a discussion of incentives given to football players, see *supra* note 213 and accompanying text.

252. See *Vargo v. Svithchan*, 301 N.W.2d 1, 5-8 (Mich. Ct. App. 1980) (discussing rationale of case).

253. See *id.*

254. See *id.*

255. See *Kleinknecht*, 989 F.2d at 1372.

256. For a discussion on how to prevent heat exhaustion, see *supra* notes 81-91 and accompanying text.

linemen like Stringer, must maintain obese weight levels.²⁵⁷ The large amount of weight that football players carry increases the foreseeable risk of heat exhaustion because their bodies insulate more heat than an average-sized person.²⁵⁸

Third, the early *Landress* decision, previously discussed, helps another foreseeability argument.²⁵⁹ Although the *Landress* decision has since been overruled, Judge Cardozo's dissent argued that sunstroke is just a common accident and recognized no duty for plaintiffs to stay out of the sun.²⁶⁰ Cardozo's argument, therefore, results in no duty assignment to anyone in heat exhaustion injuries. Ms. Stringer could distinguish her case by arguing that while the golfer in *Landress* voluntarily played golf under hot sun, the NFL set Stringer's humid, sunny practice, and thus, controlled the foreseeable result of sunstroke and further injuries.²⁶¹

c. Increase to Inherent Risks

The NFL potentially increased the inherent risks present in football in several ways. First, as previously discussed, the obesity of players results in increased chances of suffering from heat exhaustion.²⁶² Unlike the court's statement in *Gehling*, faulting the plaintiff for weighing too much to safely finish the run, NFL team contracts, and not the players themselves, now control players' weight gains that ultimately contribute to heat exhaustion injury.²⁶³ Second, extreme heat unnecessarily increases risks inherent to the game of football, even though alternatives abound: covered practice facilities, early morning/late day practices, and "black-flag" days.²⁶⁴ Third, by not updating medical procedures mandating im-

257. For a discussion on the obesity of today's professional football players, see *supra* notes 239-41 and accompanying text.

258. For a discussion on the increased risks of heat exhaustion facing obese persons, see *supra* note 82 and accompanying text.

259. See *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491, 495-97 (1934) (explaining majority's rationale).

260. See *id.* at 498-99 (dissenting).

261. See *id.* at 494-95 (stating facts of case).

262. For a discussion on the increased risks of heat exhaustion facing obese persons, see *supra* note 82 and accompanying text.

263. See *Gehling v. St. George's Univ. Sch. of Med., Ltd.*, 705 F. Supp. 761, 766 (E.D.N.Y. 1989).

264. See *Press Release*, *supra* note 14 (listing alternatives to avoid heat exhaustion). "Black-flag" days refer to days in which the military limits physical activities to prevent "heat stress problems." See Edwards Air Force Base Guide - 95th Medical Group, *Heat Stress Information*, at http://www.edwards.af.mil/95med-group/docs_html/AMDS/Bioenvironmental/heat_stress.html (last visited Dec. 1, 2004) (giving table of flag stages). For other alternatives the NFL could explore, see *infra* notes 302-307 and accompanying text.

mediate proper care, the NFL failed to address the progressive nature of heat exhaustion recognized in *Mogabgab*.²⁶⁵

2. *Stringer's Assumption of Risk*

The NFL will likely rebut Ms. Stringer's complaint by asserting an affirmative defense: the assumption of risk doctrine. To successfully support this assertion, the NFL should argue that Stringer had knowledge of the risks involved with football, and yet, he voluntarily assumed those risks anyway.

a. Knowledge of Inherent Risks

The NFL will assert that because Stringer was an adult professional athlete, and had been playing football all his life, he understood any increased strains that result from practicing in the heat.²⁶⁶ Courts assume professional athletes have a greater understanding of risks inherent to their sport because of their experience.²⁶⁷

With regard to the risks related to the culture of football, the NFL will likely assert that Stringer and other football players choose to push themselves, not because they need to meet some intangible standard set by the NFL, but to achieve their own goals.²⁶⁸ The NFL may also point to players' salaries and insist players choose to contract for multimillions in exchange for playing a physically demanding sport with inherent risks.²⁶⁹

Kelci Stringer can rebut this assumption of risk defense by arguing that when her husband assumed the risks associated with football, he assumed only direct injuries associated from football games, not indirect injuries from practice conditions and a "deadly culture."²⁷⁰ The lower court in *Benitez*, quoting a common Latin aphorism, held that "[the player] who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and

265. See *Mogabgab v. Orleans Parish Sch. Bd.*, 239 So. 2d 456, 460 (La. Ct. App. 1970). For a discussion of Stringer's wait before arriving at the hospital, see *supra* note 25 and accompanying text.

266. For a discussion on how courts view the experience of professional athletes, see *supra* notes 66, 139 and accompanying text.

267. For a discussion on how courts view the experience of professional athletes, see *supra* notes 66, 139 and accompanying text.

268. For a discussion of what drives professional athletes, see *supra* notes 211-13 and accompanying text.

269. For a discussion of the economic circumstances of the average professional athlete, see *supra* note 213 and accompanying text.

270. For a discussion about likelihood that Stringer understood these risks, see *supra* note 139 and accompanying text.

necessary.”²⁷¹ In contrast, the danger Stringer faced was not obvious to him, and the NFL-provided medical doctors, not Stringer, should understand the relationship between the heat index, a player's potential heat absorption, and the likelihood of resulting injuries.²⁷²

b. Voluntariness

The NFL will also argue that Stringer voluntarily assumed the risks inherent in football when he chose professional football as his career.²⁷³ With regard to the risks related to practicing in the heat, the NFL will claim that although training camps are mandatory, the Vikings made water breaks and other relief available to Stringer, but he did not take advantage of them.²⁷⁴ Because Stringer played for the six previous seasons and was selected as a Pro Bowl player, the NFL may also contend that he felt less pressure to keep his position than other players, so if anything, playing past his limitations could only be motivated by a voluntary, personal choice.²⁷⁵

Kelci Stringer can rebut this argument by pointing to the overwhelming evidence that players, including her husband, do not have voluntary choices in football.²⁷⁶ The devotion to a collective team identity often results in individual players ignoring their own pain and limitations.²⁷⁷ In addition, some football teams now even include clauses in player contracts that give teams the right to take away signing bonuses if a player publicly speaks negatively about his coach or team.²⁷⁸ The Ohio courts recognized in *Snider v. Clermont Central Soccer Association* that employees realistically cannot ignore

271. See Meier, *supra* note 42, at 114 (quoting *Benitez v. N.Y. City Bd. of Educ.*, 541 N.E.2d 29, 32 (N.Y. 1989)); see also *King v. Univ. of Indianapolis*, NA 01-233-C-B/H, 2002 U.S. Dist. LEXIS 19070, at *13-15 (S.D. Ind. Oct. 3, 2002) (describing rationale of holding).

272. For a discussion of medical views on heat exhaustion, see *supra* notes 81-91, and accompanying text.

273. For a discussion on assumption of risk, see *supra* notes 132-56 and accompanying text.

274. For a discussion of the importance of water replenishment during football practices, see *supra* note 88 and accompanying text.

275. For a discussion on group psychology in football, see *supra* notes 227-36 and accompanying text.

276. For elaboration on the group psychology of football, see *supra* notes 227-36 and accompanying text.

277. For details on group psychology in football, see *supra* notes 227-36 and accompanying text.

278. For a discussion of the recent policy adoption by one NFL team, see *supra* note 236 and accompanying text.

their employers' directives, even if those directives put them in danger.²⁷⁹

C. Potential Creative Legal Arguments

Because Ms. Stringer has asserted the creative claim that the NFL's "deadly culture" contributed to the heat exhaustion that ultimately killed her husband, creative legal arguments are needed to substantiate the claim. Two possible arguments include an inherent compulsion argument, currently only used in New York, and a public policy argument that appeals to the court's notions of equity and justice.

1. *Inherent Compulsion Analysis*

In order to successfully argue an inherent compulsion theory, Ms. Stringer will need to show two elements. First, she will need to demonstrate that the NFL, a superior, directed her husband's actions; and second, that there was some form of economic duress related to the directive.²⁸⁰

a. Superior's Directive to Act

The complaint refers to the NFL culture as one "which unreasonably subjects players to heat-related illness during practices, ostensibly out of the twisted belief that players benefit from being subjected to such working conditions" ²⁸¹ This "subjection" to undesirable working conditions may be viewed as an implied directive by a superior. When offensive coach Mike Tice teased Stringer in front of his teammates with the newspaper picture capturing his

279. See *Snider v. Clermont Cent. Soccer Ass'n*, No. CA98-07-056, 1999 Ohio App. LEXIS 1126, at *11 (Ohio Ct. App. Mar. 22, 1999) (discussing court's rationale).

280. For a discussion of the elements of inherent compulsion, see *supra* notes 163-67 and accompanying text.

281. See *Complaint*, *supra* note 11, at 7-8. Some of the other suit allegations include that the NFL, and its medical advisor and head of the NFL Safety and Injury Panel, Dr. John Lombardo:

[F]ailed to establish practice regulations for hot and/or humid conditions [F]ailed to establish procedures to ensure the proper acclimatization [F]ailed to establish practices and procedures, or even make recommendations to member clubs . . . for the adequate care and monitoring of players suffering heat exhaustion [F]ailed to require that an adequate heat-related illness history be taken

Id. at 8-10.

Addressing only the NFL, the complaint alleges that "[t]he NFL has tolerated, condoned, and fostered a culture among coaches, athletic trainers, and team physicians that subjects players to the conditions such as . . . extreme heat and humidity" *Id.* at 10.

heat exhaustion symptoms from an earlier practice, he implied that Stringer was weak, and that he should ignore future feelings of heat exhaustion in order to "be a man."²⁸² The teasing from Tice, who is now the head coach for the Vikings, demonstrates the traditional culture of football, in which the greatest coaches are celebrated for demanding that their players push through pain.²⁸³ Perhaps years of this coaching technique has made pain second nature for many players, and has removed a player's ability to know or recognize his physical limits.²⁸⁴

It might also be argued that the inherent compulsion in football - the pressure to give 110% no matter what - came from Stringer's teammates, not a superior.²⁸⁵ If group psychology asserts pressure on players, however, the group still learned this behavior through superiors who taught that players must make individual sacrifices in order to achieve team goals.²⁸⁶

b. Economic Pressures

Even if Stringer was aware that heat exhaustion presented a risk in football, there is much doubt that he could act upon his worry due to the many economic considerations at stake.²⁸⁷ NFL football careers last, on average, four years.²⁸⁸ With the pressure to earn a lifetime of income within a short career, players feel that they have no option but to accept whatever conditions - including playing with pain or in extreme heat - are presented, because their economic window of opportunity is too short to object.²⁸⁹

Like the scholarship pressure in the *Benítez* case, and the tryout pressure in the *Vargo* case, NFL players constantly feel insecure

282. For the facts on Stringer's death, see *supra* notes 18-29 and accompanying text. If it is true that a group mentality exists in football, resulting in pressure, Stringer would want to make up for his illness that day to his teammates by performing well on the day he collapsed and died. For a discussion on the group mentality in football, see *supra* notes 227-30 and accompanying text.

283. For a discussion about the great football coaches who used similar methods, see *supra* notes 214-17 and accompanying text.

284. For a discussion about the great football coaches who used similar methods, see *supra* notes 214-17 and accompanying text.

285. For a discussion on the group mentality in football, see *supra* notes 227-36 and accompanying text.

286. For an elaboration of the group mentality in football, see *supra* notes 227-36 and accompanying text.

287. For a discussion of the economic reality for football players, see *supra* note 213.

288. For a discussion of the length of an average football player's career, see *supra* note 213.

289. For a discussion of the realities of football player's economic position, see *supra* note 213.

about their jobs for another reason.²⁹⁰ Players are constantly reminded that there is someone to replace them if their performance is not above and beyond expectations.²⁹¹ It seems that the second prong of inherent compulsion is met because the economic pressure to perform is a consistent part of being an NFL football player.

2. *Public Policy Arguments*

As quoted from *Kleinknecht*, the court will consider “[t]he hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall” when determining if a defendant has a duty of care.²⁹² These considerations favor each party differently.

a. History and Tradition Favor the NFL

The court may be hesitant to trample the long history of football and the great traditions of past coaches, which not only built a new American pastime, but also contributed to the American competitive spirit.²⁹³ Favoring the view that football plays an integral role in society, the court may not want to interfere with how professional sports maintain and govern champion athletes.²⁹⁴ The court may also not want to open the door to a barrage of new litigation, as allowing Ms. Stringer to collect in this case may send the message to other potential plaintiffs that they too can collect from the deep pockets of the NFL.²⁹⁵

b. Morals, Justice, and Notions of Fairness Favor Stringer

Even if the NFL did not have a duty of care to Stringer under a traditional legal analysis, the court may believe it good public policy to hold the NFL responsible for fostering a healthy, ethical culture, especially in light of football’s integral role in American society

290. See *Benitez v. N.Y. City Bd. of Educ.*, 541 N.E.2d 29, 32 (N.Y. 1989); see also *Vargo v. Svithchan*, 301 N.W.2d 1, 4-5 (Mich. Ct. App. 1980).

291. For a discussion about the pressure for football players to perform, see *supra* notes 223-37 and accompanying text.

292. See *Kleinknecht v. Gettysburg College*, 989 F.2d 1360, 1372 (3d Cir. 1993) (quoting *Gardner v. Consol. Rail Corp.*, 573 A.2d 1016, 1020 (Pa. 1990) (quoting *Sinn v. Burd*, 404 A.2d 672, 681 (Pa. 1979))).

293. For a discussion of football’s positive influence in America, see *supra* notes 218-22 and accompanying text.

294. For a further illustration of football’s positive influence in America, see *supra* notes 218-22 and accompanying text.

295. For a discussion of the court’s concerns, see *supra* note 126 and accompanying text.

from which the NFL profits.²⁹⁶ The NFL should not be allowed to benefit from elite football athletes pushing themselves 110% and then contend that those same athletes assumed their own risks if they die.²⁹⁷ If the NFL wants to keep its sport elite, it should recognize its duty to keep athletes within appropriate, healthy boundaries.²⁹⁸

There are good reasons to recognize the disproportionate power held by the NFL compared to the average individual player. Because NFL players only have, on average, four years to make a lifetime of compensation, the NFL should bear the burden of tort loss, as it is not restrained by the same economic concerns.²⁹⁹ Like NCAA "voluntary" practices, the court should consider that the NFL possesses disproportionate power, which makes it unreasonable that Stringer could have objected to practicing in the August heat and could have voluntarily sat out of a practice.³⁰⁰

V. IMPACT

"[S]port mirrors society. The values we reinforce in society are the values we will reinforce in sport."³⁰¹ The courts have the opportunity to make sure the NFL takes this responsibility seriously. Since the commencement of the Stringer lawsuit, several other plaintiffs have also sued the NFL based on various aspects of its culture.³⁰²

There are quick and easy policies the NFL should adopt to reduce the chance of heat exhaustion for its players. First, the exhibi-

296. For a discussion of football's influence in America, see *supra* notes 218-22 and accompanying text.

297. For a discussion of the NFL's concern over image relating to culture, see *supra* notes 206-09 and accompanying text.

298. For a discussion of football's culture of pressure, see *supra* notes 223-26 and accompanying text.

299. For a discussion on the economic realities facing football players, see *supra* note 213.

300. For a discussion on the NCAA "voluntary" practices, see *supra* notes 129-31, 225 and accompanying text.

301. See Meier, *supra* note 42, at 144 (quoting DONALD CHU, DIMENSIONS OF SPORT STUDIES 151 (1982)).

302. See Don Singleton, *Suit Blames NFL in drunk-driving horror*, N.Y. DAILY NEWS, Oct. 11, 2003 (describing parents' suit based on drunken football fan causing car accident resulting in daughter's paralysis), available at <http://www.nydailynews.com/news/vpfriendly/story/125741p-112713c.html>. The suit claims that the "NFL has created 'a dangerous situation by causing and permitting visibly intoxicated persons in great numbers to consume alcohol and then operate their motor vehicles.'" *Id.* "[The] NFL has the authority to control the sale of alcoholic beverages at their franchisee stadiums." *Id.*

tion season should be shortened.³⁰³ Fewer exhibition games would ease the training schedule and allow for days of rest in between practices.³⁰⁴ Second, the summer training camps should be shortened.³⁰⁵ Because modern professional athletes condition throughout the year, it does not take as long for them to prepare for the season.³⁰⁶ Third, there should not be practices in extreme heat.³⁰⁷ Alternatives to practicing in the heat include going indoors to review videotapes and the playbook, practicing at night, or building a covered practice facility.³⁰⁸

But most of all, every football player, coach, and fan should challenge the machoism culture that abounds in football.³⁰⁹ As one ESPN commentator put it: "Everyone buys into this gladiator nonsense Enough of that. [The players] are preparing to play a game, not storm the beaches of Normandy."³¹⁰ The Stringer lawsuit challenges the machoism culture of football and, although faced with many legal hurdles, could lay the important groundwork for similar future challenges.

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303. See Caple, *supra* note 3 (noting that current exhibition seasons include four games). The four games are not needed to decide starting players, or to rally fans, but only to make money. NFL team owners require any season ticket purchaser to also purchase the four exhibition games. *Id.*

304. See *id.* (finding no reason exhibition season couldn't be shortened).

305. See *id.* (describing typical training camps as six weeks). A director of sports medicine at the University of North Carolina, Dr. Fred Mueller, believes the NFL should look at three things to prevent future heat strokes: first, the NFL should change the time of the practices or make them shorter whenever there is a high heat index; second, the NFL should not just make water breaks available, but enforce them, requiring players to drink water; third, ensure that players are acclimatized to the temperature before putting them in full pads in the heat. See George, *supra* note 4, at D4 (noting Dr. Mueller has studied data back to 1931 relating to heat stroke deaths in football).

306. See Caple, *supra* note 3; see also Patrick, *supra* note 2 ("While yesterday's players had offseason jobs, football is now a full-time job").

307. See Caple, *supra* note 3. The day Stringer died was the hottest in forty years in that area of Minnesota, and there was a cow alert to spray down cattle. See also *Culture of Obesity*, *supra* note 82, § 8, at 5 (noting how heat effects obese).

308. See Caple, *supra* note 3 (recommending safer practices in face of heat exhaustion problems); see also Bauer, *supra* note 81, at 4 (recommending "to work in environments that are shaded").

309. See Caple, *supra* note 3. For a discussion of why machoism in football should be challenged, see *supra* notes 223-41 and accompanying text.

310. See Caple, *supra* note 3 (pointing out that even though Stringer had vomited several times and was carted off field day before, he was back at it harder than ever very next day because "he felt the need to prove himself").